(26,705)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 619.

MICHAEL U. BOEHMER, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 6, 1919.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,
against
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Civ. No. 1094.

SUMMONS.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable John R. Hazel, Judge of the District Court of the United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said court, this 22nd day of January, in the year of our Lord, one thousand nine hundred and sixteen.

S. W. PETRIE,
Clerk.

(Seal)

MESSRS. SULLIVAN, BAGLEY & WECHTER,
Plaintiff's Attorneys,
Office and Post Office Address,
809 Chamber of Commerce,
Buffalo, New York.

COMPLAINT.

5 UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,
6 *Defendant.*

The plaintiff, by Sullivan, Bagley & Wechter, his attorneys, for his cause of action against the defendant alleges, upon information and belief:

First: That he is a resident of the City of Buffalo, Erie County, State of New York, and of the Western District of such state.

7

Second: That the defendant, Pennsylvania Railroad Company, is a foreign railroad corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and engaged in the operation of a railroad through said Western District of the State of New York.

8 Third: That at all times hereinafter mentioned said defendant was a common carrier by railroad, engaged in commerce between the several states of the United States, and that at all times hereinafter mentioned the plaintiff was in the employ of the defendant in such interstate commerce.

Fourth: That while the plaintiff was in the employ of the defendant in such interstate com-

merce he suffered injuries on the eighth day of November, 1915, at the Village of Brocton, New York, which injuries resulted in whole or in part from the negligence of its officers, agents or employes of the defendant, and by reason of defects and insufficiencies, due to defendant's negligence, in its cars and equipment; that such injuries consisted of mental and nervous shock and the crushing of his right leg so that it was necessary to amputate the same between the ankle and knee.

Fifth: That among other things said defendant carelessly and negligently directed and required the plaintiff to assist in the movement of a car at Brocton, New York, not properly equipped with handholds and steps attached to or near the corners thereof, in accordance with the usual custom and statutes and governmental rules in such case made and provided; and that said defendant carelessly and negligently failed and neglected to instruct this plaintiff, who had been but recently employed in its service, that it would require him to work upon, around and about cars in such interstate commerce conducted by it and that it would operate cars in such interstate commerce which were not equipped with footholds, handholds and steps, at or near all corners thereof.

Sixth: Plaintiff further alleges that the officers, agents and employes of the defendant were otherwise careless and negligent, all of which carelessness and negligence resulted in whole or in part in the injuries sustained by plaintiff.

13 Seventh: That said officers, agents and employes of the defendant carelessly and negligently failed to instruct the plaintiff in regard to the performance of his duties, and also carelessly and negligently failed to instruct him in regard to dangers known, or which should, in the use of reasonable care, have been known to the defendant, its officers, agents and employes, and which were unknown to this plaintiff.

14 Eighth: That by reason of the facts aforesaid the plaintiff has suffered damages in the sum of twenty-five thousand ($25,000) dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of twenty-five thousand dollars ($25,000), together with the costs

15 of this action.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff,
809-812 Chamber of Commerce Bldg.,
Buffalo, New York.

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16 State of New York, }
County of Erie, } ss.:
City of Buffalo. }

MICHAEL U. BOEHMER, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to those matters therein stated to be alleged upon in-

formation and belief, and that as to those matters he believes it to be true. 17

MICHAEL U. BOEHMER.

Subscribed and sworn to before
me this 21st day of Jan'y, 1916.
Samuel Geinsburg,
Notary Public, Erie County, N. Y.

18

ANSWER.

UNITED STATES DISTRICT COURT.

FOR THE WESTERN DISTRICT OF NEW YORK.

19

MICHAEL U. BOEHMER,
Plaintiff,
against
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The defendant above named answering the complaint herein by Rumsey and Adams, its attorneys: 20

Admits that the defendant at all the times mentioned in said complaint was and still is a foreign railroad corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania and engaged in the operation of a railroad through said Western District of the

21 State of New York. That at all said times it was a common carrier by railroad, engaged in commerce between the several states of the United States, and that at all said times the plaintiff was in the employ of the defendant in such interstate commerce.

22 The defendant further admits that the plaintiff was in its employ in such interstate commerce on the 8th day of November, 1915, at the Village of Brocton, N. Y., at which time he received injuries by reason of accident, which necessitated the amputation of his right foot.

23 The defendant further answering said complaint, denies each and every allegation in said complaint contained, except the allegations thereof hereinbefore specifically admitted.

SECOND.

24 The defendant further answering said complaint, and as a separate and distinct defense thereto, alleges upon information and belief that said plaintiff had been in its employ for a considerable time prior to November 8th, 1915, as a freight brakeman, and well understood the nature of the work which he was required to perform, and well understood such dangers as were involved in such employment, and that by entering and continuing in the service of the defendant in said capacity, he assumed all risk incident to such employment and involved therein, including risks of an accident such as that set forth in the complaint.

Answer.

THIRD.

The defendant further answering said complaint, and as a separate and distinct defense thereto, alleges upon information and belief that the injuries of the plaintiff were the result of negligence and carelessness upon the part of said plaintiff, and that they were caused, or contributed to, by negligence on his part, and not by reason of any negligence on the part of the defendant.

WHEREFORE, the defendant demands judgment dismissing the complaint with costs.

RUMSEY & ADAMS,
Attorneys for Defendant,
608 Brisbane Building,
Buffalo, N. Y.

State of New York,
County of Erie,
City of Buffalo. } ss.:

H. J. ADAMS, being duly sworn, deposes and says that he is one of the attorneys for the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the

defendant is a foreign corporation, which is the reason why this verification is made by deponent.

Deponent further states that the ground of his belief as to all matters not stated in said answer upon his own knowledge, are reports made to deponent, and other documents and correspondence relating to the matter or matters in question or controversy, and to the subject of the allegations denied in and by the allegations contained in said answer.

H. J. ADAMS.

Subscribed and sworn to
before me this 29th
day of February, 1916.
Sara J. Brady,
Commissioner of Deeds,
Buffalo, N. Y.

CLERK'S MINUTES OF TRIAL.

UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
vs.
PENN. R. R. CO.

Civ. # 1094
Trial before the Court and a Jury.

Present: Hon. Edwin S. Thomas, *D. J.*
March 27, 1917.

Appearances:
Thomas A. Sullivan, Attorney for Plaintiff.
Mr. Adams, Attorney for Defendant.

Clerk's Minutes of Trial.

The court orders a jury to be impanelled and 33
that the trial of the action do now proceed.

Whereupon the following jurors were drawn and sworn:

Wendell C. Warner,	John C. Funk,
Lewis Pruefert,	George G. Persons,
John H. Shiffrens,	Alfred Staniland,
Porter Eastman,	Henry F. Schepert,
John P. Fitzgerald,	William A. Fenn,
John H. Ballou,	Frank P. Mills.

34

Mr. Sullivan opens for the Plaintiff.

Mr. Adams opens for Defendant.

Witnesses for the Plaintiff:

John Ullman.

Michael U. Boehmer.

Daniel J. Delahunt. 35

William H. Marcy.

Plaintiff rests.

Defendant moves to dismiss the complaint. Motion denied.

Witnesses for Defendant:

George F. Laughlin.

March 28, 1917. 36

Trial concluded.

Same appearances.

Witnesses for Defendant:

Cornelius J. Keating.

George F. Laughlin (re-called).

William J. Eidell.

37 Fay Hipwell.
Pat J. Mulligan.
Defendant rests.

Witnesses for Plaintiff:
Daniel J. Delahunt (re-called).
Both sides rest.

38 Defendant renews motion for nonsuit made at the close of plaintiff's case and for a direction of a verdict of no cause of action; thereupon the court directs the jury to bring in a verdict of no cause of action. The jury reports accordingly a verdict of no cause of action.

Sixty days from entry of judgment to plaintiff to file a bill of exceptions.

39

JUDGMENT.

UNITED STATES DISTRICT COURT.
WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,

40 vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The above entitled action having been regularly brought on for trial at a Trial Term of the United States District Court for the Western District of

Judgment.

New York, held at the Federal Building in the City of Buffalo, N. Y., on the 27th day of March, 1917, before the Hon. Edwin S. Thomas, Judge of said court, and the respective parties having appeared by their attorneys and the allegations and proofs on the part of the plaintiff and defendant having been heard and considered, and at the close of all the evidence the defendant having made a motion for a direction of a verdict by the court in its favor of no cause of action, and the said judge having granted said motion and the jury having duly rendered a verdict in favor of the defendant of no cause of action pursuant to the order of the court, and the costs of the defendant having been taxed at the sum of eighty-one dollars and seventy-five cents ($81.75). 41 42

Now on motion of Rumsey and Adams, attorneys for the defendant, it is 43

ADJUDGED, that the defendant have judgment against the plaintiff upon the issues in this action and that the complaint be and the same hereby is dismissed and that the defendant have judgment against the plaintiff in the sum of eighty-one dollars and seventy-five cents ($81.75) costs as taxed, and have execution therefor. 44

Judgment signed this 5th day of April, 1917.

HARRIS S. WILLIAMS,
Deputy Clerk.

ORDER DENYING MOTION FOR NEW TRIAL.

45 At a Term of the United States District Court held in and for the Western District of New York, at the Federal Building in the City of Buffalo, New York, on the 28th day of March, 1917.

Present: Edwin S. Thomas,
Judge Presiding.

46 MICHAEL U. BOEHMER,
Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The issues in this action having been regularly
47 brought on for trial at a term of this court on the 27th day of March, 1917, and the issues having been tried and the defendant having made a motion for a direction of a verdict in its favor of no cause of action at the close of all the evidence, and said motion having been granted by the court and the plaintiff having moved to set aside said verdict and for a new trial upon the minutes of the
48 court, and after hearing Thomas A. Sullivan, of counsel for said plaintiff, in support of said motion and H. J. Adams, of counsel opposed thereto, it is hereby

ORDERED that the plaintiff's motion to set aside the verdict and for a new trial be and the same hereby is denied.

EDWIN S. THOMAS,
United States Judge.

BILL OF EXCEPTIONS. 49

UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff-Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee. 20

The above named plaintiff feeling himself aggrieved by the proceedings, verdict and judgment herein presents the following as the bill of exceptions in this cause.

51

TESTIMONY.

UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY,
Defendant. 52

Trial had before the Hon. Edwin S. Thomas, Justice presiding, and a jury, at the City of Buffalo, N. Y., beginning March 27th, 1917, at 10:00 o'clock in the forenoon.

53 Appearances:

Messrs. Sullivan, Bagley & Wechter, for plaintiff.

Messrs. Rumsey & Adams, for defendant.

Examination of jurors.

Jury finally accepted and sworn.

Plaintiff's counsel opens case.

Defendant's counsel opens case.

54

JOHN ULLMAN, being duly sworn as a witness for plaintiff testified as follows:

Direct Examination by Mr. Sullivan:

Q. Mr. Ullman, where do you reside?

A. Buffalo.

Q. What is your business?

55 A. Civil engineer.

Q. How long have you been such?

A. Over 20 years.

Q. Did you, at the request of my office, prepare an outline, plan or map from a survey of the yards at Brocton, of the Pennsylvania and Nickel Plate?

A. Yes, sir.

56 Q. Did you reduce that to a drawing?

A. Yes, sir.

Q. Is this drawing on the board here that drawing?

(Witness shown a drawing).

A. Yes, sir.

Q. That is drawn to a scale?

A. Yes, sir.

Q. That scale is what? 57

A. One inch in the drawing is equal to 20 ft. on the ground.

Q. Is there an arrow or mark there to indicate the general directions?

A. Yes, sir.

Q. The arrow on the top of that drawing is what?

A. Points to the north.

Q. What tracks are shown on this map? 58

A. Main track of the Pennsylvania Railroad and sidings,—

The Court: Take the pointer, and point them out.

A. The main track of the Pennsylvania Railroad is at the bottom, the south part of the drawing; the passing siding is next; the next north of the passing siding of the Pennsylvania are three 59 other tracks, then the main track of the Nickel Plate Railroad, and a siding, and next to that, at the top of the drawing, is shown the transfer tracks, which connects the Nickel Plate with the Lake Shore, which is farther to the north, and not shown here.

Q. You have indicated on that map, by letters, what these tracks are? 60

A. Yes, sir.

Q. That is the yellow and brown lines within the black lines indicate the tracks?

A. Yes, sir; the shading is between the rails, and shows the space occupied.

Q. Those tracks are all standard gauge?

A. Yes, sir.

61 Q. That is how wide?

A. 4 ft. 8½ inches between the inside of the head of the rails.

Q. To the left-hand end of that map, as we look at it here, is to the southwest, and towards Erie and Mayville.

A. Yes, sir.

Q. To the right hand is that which extends to
62 Dunkirk and Buffalo?

A. Yes, sir.

Q. It runs on a bias with the compass at that point, as indicated by the arrow?

A. Yes, sir.

Q. There are some yellow shadings within the dark lines there, to the south portion of this map; what are they?

A. Those indicate buildings, and the uses for
63 them are shown here, and marked "Office," "Shed," "Brocton Station," and the "Freight House" next to it; over east is a small square with "B. M." in it, indicating a signal office. (Indicates).

Q. "B. M." is the initial of the signal tower?

A. Yes, sir.

Q. Those signal towers, you understand, are
64 indicated by letters in that way?

A. Yes, sir.

Q. There is between the tracks there, and a little to the right of the lines across the drawing—across the tracks—there is a little enclosure there; what is that? I think that is marked "Flag shed."

A. That is "Flagman." That is an elevated

structure, which is occupied by the man that controls the crossing gates over the highway, which is indicated by the dotted lines. (Indicates). 65

Q. There is a highway crossing at that point indicated there?

A. Yes, sir.

Q. This plan, as you have laid it out here, shows the relation of these tracks one to the other, and these buildings, and also indicates the switch points? 66

A. Yes, sir.

Mr. Sullivan: You may ask.

CROSS EXAMINATION by Mr. Adams:

Q. This was made from an actual survey?

A. Yes, sir.

Q. It is an accurate map of that location?

A. Yes, sir. 67

Q. When was that made?

A. About the middle of July, last year.

Q. This road crossing is an ordinary country road, I take it?

A. It is not a paved street; I do not know what the traffic is on either side of it.

Q. You did not see very much go by there when you were there? 68

A. I did not observe.

Q. You were there in the daytime?

A. Yes, sir.

Q. That is an ordinary dirt road, is it not?

A. Yes, sir.

Q. Running through the country?

A. Yes, sir.

69 Q. In the farming section?

A. I don't know, Mr. Adams.

Q. You should be able to tell?

A. It is not a city street, if that is what you want.

Q. It is quite a little ways from Brocton village?

A. I don't know how far Brocton village is.

70 Q. What do you say the scale of the map is?

A. 20 ft. to the inch.

Q. Where is the Pennsylvania track—the main line?

A. Here. (Shows).

Q. That is indicated on the map—

A. It is marked—

Q. "Main track. Pa. R. R."?

A. Yes, sir.

71 Q. You have got both "East Bound" and "West Bound" on the same track; that means there is only one track there?

A. That is the way I understand it. There is a passing siding next to it, which is probably used by the west bound, and the main track, as I marked it, may be for the east bound there.

Q. The passing siding there is probably used

72 for passing purposes?

A. Yes, sir.

The Court:

Q. What is that bottom line?

A. A siding, still again; that had some cars on it the day I was there. (Shows).

RE-DIRECT EXAMINATION by Mr. Sullivan: 73

Q. You observed some buildings quite close to the railroad on that road?

A. Yes, sir.

Q. Quite a lot of buildings?

A. Do you mean going along the street here?

Q. Yes, sir?

A. There was some; I did not notice what they were. 74

Mr. Sullivan: I offer the map in evidence.

Map received in evidence, without objection, and marked Plaintiff's Exhibit #1.

RE-CROSS EXAMINATION by Mr. Adams:

Q. In answer to my question you said you did not observe anything about the surroundings there; is that right, or not? 75

A. I only paid particular attention to the survey of the map, and the ground shown on the map.

Q. You did not see very many houses there, did you?

A. There was some.

Q. Did you put them on the map?

A. They are beyond the outlines of the map. 76

Q. How many were there?

A. I don't remember.

Q. You do not know anything about them?

A. Not very much; no, sir.

Q. That is all farming territory about there, is it not?

A. In a general way; yes, sir.

77 Q. No settlement there?
A. Not right around the station.
Mr. Adams: That is all.

MICHAEL U. BOEHMER, being duly sworn as a witness in his own behalf, testified as follows:

78

Direct Examination by Mr. Sullivan:

Q. Where do you live?
A. #31 Troupe street.
Q. Buffalo?
A. Yes, sir.
Q. How old are you?

79 A. 32.
Q. What is your birthday?
A. September 20th.
Q. Were you 32 last September, or will you be 32 the coming September?
A. I will be 33, coming September.
Q. Was there a time that you were employed by the Pennsylvania Railroad Company?

80 A. Yes, sir.
Q. Do you recall when you first went to work for them,—about?
A. That was some time in 1915, or 1914, I think—in November, if I am not mistaken.
Q. What was your work with them?
A. In the Signal Department.
Q. What did you do in the Signal Department?

A. I was rated as a carpenter. 81

Q. Where did you live then?

A. Corry, Pa.

Q. Where did you work while in that department?

A. All over the entire system.

Q. Where did you sleep, live and eat while you were out away from Corry?

A. They supplied us with a car, and furnished 82
us with a paid cook, and we furnished the utensils, victuals; they supplied us with a place to put our bedding, to sleep—we slept in cars.

Q. Did you have anything to do with the management and handling of trains or cars?

A. No, sir.

Q. Switching, braking, coupling and uncoupling?

A. No, sir, I did not. 83

Q. How long were you in this signal service? What time did you quit that service?

A. I hired out as brakeman to Mr. Rupert, in September, if I remember rightly,—the following year.

Q. 1915?

Q. Where were you then employed as brake-
man—where were you first employed after you 84
entered that employment; where did you go to work?

A. I worked out of Corry as brakeman, after making my student trips.

Q. What are student trips?

A. One complete round trip over the entire system—over the main line, and over what we call the "Creek."

85 Q. What do you mean by the "Creek"?

A. That is the division under that name.

Q. Did you go over the entire Pennsylvania system, or just this division where you were employed?

A. I went from Buffalo to Emporium and return, and Buffalo to Oil City and return.

Q. Did you go to Mayville and Erie?

A. Yes, sir.

86 Q. You passed through Mayville?

A. Yes, sir.

Q. What did you go to doing then?

A. Went on what they call the "Corry turn job."

Q. What is that?

A. Take an engine and cabcose out of Corry, Pa., and pick up all the empties, and take them

87 to Oil City; get a train and bring it back to Corry, and set off to Titusville, occasionally.

Q. In doing that work were you required to couple and uncouple cars?

A. Yes, sir.

Q. And to board cars?

A. Yes, sir.

Q. When was the first time you had made a regular trip with a train to Buffalo?

88 Mr. Adams: What do you mean by a regular trip?

Q. From Oil City to Buffalo?

A. On the day I was injured.

Q. How far had you gone from Oil City—what was the difference in the work you had done before that time—before that night, and the work you were required to do on that train—what difference was there, if there was any difference?

A. I don't think there was any difference. 89

Q. You do not think there was any difference?

A. No, sir.

Q. What had you observed, and what had you used on cars, in your brakeman service to get aboard the cars?

A. My hands and feet.

Q. What appliances were there on the cars, that you used?

Mr. Adams: I object to the question. 90

The Court: Objection sustained.

A. Handhold and stirrup—

Q. Describe to the court just what transpired on this night; when did you leave Oil City?

A. I think we were ordered for 6:50.

Q. Who were in the crew?

A. The other brakeman and myself—the other brakeman's name was Delahant; the conductor was William Idle; the flagman was William G. Pickard; the engineer was a man named Hipwell; I don't remember the fireman's name; I never met the man before. 91

Q. What stations did your train stop at?

A. Do you mean the entire stops from Oil City?

Q. Any place where you did any work?

A. She made one stop to do work at Corry, Pa. 92

Q. What work was done there?

A. Nothing more than set off a certain amount of cars—if I remember right, 18, or something of that kind.

Q. You proceeded then?

A. Yes, sir.

93 Q. Was there a time when information was given you that there was to be a stop made at Brocton?

A. Yes, sir.

Q. Where did you receive that information?

A. At either "P. S." or Kr." block station; I don't remember which.

Q. Tell the court and jury what you mean by "P. S." block station?

94 A. A station where the railroad company has an operator employed, to control the trains going in both directions; you receive orders to take sidings, or to proceed, or any caution the company may deem fit, from this station.

Q. What does "P. S." mean?

A. That is the code they use to telegraph one another.

95 Q. When any other operator along the line wants that station, he strikes "P. S." on his key?

A. Yes, sir.

Q. You say it was one of the stations like that —either "P. S." or "Kr."?

A. Yes, sir.

Q. That this information was given you. What were you told?

A. The message read, "Pick up grapes at

96 Brocton."

Q. How far was that away from Brocton?

A. I couldn't estimate the miles; probably four or five miles.

Q. It was at some point southwest of Brocton?

A. Yes, sir, at some point southwest of Brocton.

Q. When your train proceeded to Brocton, what happened there?

A. We stopped before we got to the switch, and opened the switch, and pulled in onto the siding. 97

Q. When you say you pulled in onto the siding, which of these tracks indicated on the map was that?

A. The next one to the main track. (Shows).

Q. The one marked "Passing Siding, #1 Track"?

A. Yes, sir. 98

Q. On that one?

A. Yes, sir.

Q. How far did you pull in on that siding?

A. Not very far.

Q. Enough to clear the points?

A. No, sir; some of our trains was out on the main track.

Q. What did you do then?

A. The other brakeman cut the engine off, and went to get coal and water. 99

Q. What did you do then?

A. Came back and coupled up, and then pulled into the siding.

Q. So that your train—after you got the coal and water—was in on that siding, free of the main track?

A. Yes, sir. 100

Q. What happened to the switch back of it then?

A. The flagman protects that.

Q. You were not back there?

A. No, sir.

Q. Where were you when the train pulled in onto the siding?

101 A. At the front end.

Q That was where the engine was?

A. Yes, sir.

Q. What transpired then?

A. We cut the engine off, and pulled down to parallel to this switch, (shows), and received instructions from the conductor—

Q. Down to here? (Shows).

A. Down in there—this switch here. (Shows).

102 We received instructions from the conductor to go over on the Nickel Plate transfer and pick up one car of grapes.

Q. What did he say in reference to that?

A. The other brakeman and myself went through #3 track—which they used for—they kept that clear so that you could go on, and we went in there free to the other. While we were

103 going back, the other brakeman told me—

Mr. Adams: Never mind that.

Q. Never mind that. Did that involve using any of the tracks of the Nickel Plate?

A. Yes, sir.

Q. What was said—what instructions did you receive about the Nickel Plate tracks?

A. We were allowed to use them for five minutes.

104 Q. The engine was backing up at this time?

A. Yes, sir.

Q. You backed up until you got beyond the switch point that would permit you to go in onto the traffic tracks?

A. Yes, sir.

Q. When you got to that point—that switch point, what did you do?

A. I got off the engine.

Q. Tell us what then happened?

A. I got off the engine.

Q. Why did he leave you there? What did he tell you?

A. He told me to stay there.

Q. What were you to do there?

A. When he shoved the car by, I was to catch the car and set the brake on it, so that it wouldn't run too far.

Q. After it quit the switch?

A. Yes, sir.

Q. How were they to get that car out?

A. I couldn't say.

Q. You do not know how they got it out, except that it came back to where you were?

A. Yes, sir.

Q. And crossed that switch point?

A. Yes, sir.

Q. What did you do as it was going by you?

A. I got on it and set the brake on it.

Q. How did you get on?

A. Grabbed for the handle and step, and got on top and set the brake.

Q. Did you have a lantern?

A. Yes, sir.

Q. How did you carry that lantern?

A. In either hand.

Q. On which side of that car did you get on as it came out to you—on which side of the tracks were you standing?

A. On that side. (Shows).

Q. That would be the north side?

A. Towards the lake.

109 Mr. Adams: Call the tracks running north and south, and the lake is to the west. All the railroad men look at it in that way.

A. I was on the west side then.

Q. What did you observe as to the sill step that you climbed up on that occasion?

A. It was very small and high. It was small; about that large, I should judge. (Shows).

The Court: Strike it out.

110 Q. Had you seen cars, and had you used cars where the step extended down farther from the sill towards the ground than on this car?

A. Yes, sir.

Q. As you boarded that car, what did you do? Describe to the jury just how you stood, and how you got on it as it passed you on this occasion.

A. I was standing like that, (shows), with the

111 lamp in my hand—

Q. Come down here and show the jury.

A. I was standing like that, and when the car came to me, I put my hand up, and put my foot up, and went on top of it.

(Witness illustrates).

Q. Have you observed railroad men boarding these cars?

A. Yes, sir.

112 Q. How did they board them?

A. The same as I did.

Q. Have you ever observed railroad men, or were you ever instructed to take your lantern and look for handholds on cars?

A. No, sir.

Q. When you set the brake, what did you do?

A. I returned to the ground.

Q. Did you throw any switches then? 113

A. I think I did; yes, sir.

Q. What happened then—did the engine come back to the car?

A. The other brakeman brought the engine back.

Q. Was it coupled onto the cars?

A. No, sir; he made the coupling.

Q. The coupling was made at that time?

A. Yes, sir. 114

Q. Did you or Delahant make the coupling?

A. Delahant.

Q. What happened then?

A. We backed up far enough so that we could back in onto #3 track.

Q. You backed down across the switch point until you reached the switch which would let you back into #3? 112

A. Yes, sir.

Q. When that was done, where did Delahant go?

A. He went back to the cabin.

Q. What did you do?

A. I rode on the tank of the engine.

Q. On which side?

A. Engineer's side.

Q. That would be on which side of the engine looking towards the cowcatcher? 116

A. East, I think.

Q. Was that right or left, looking towards the cowcatcher?

A. Right side.

Q. The engineer is on the right side of the engine, looking towards the front?

117 A. Yes, sir.

Q. How far did you ride—to what point?

A. To the switch indicated there; that one there. (Shows).

Q. Did you go to that one, or did you go to the one that would let you in on the passing siding?

A. It would be the one back here. (Shows).

Q. You proceeded down to a point which would allow the car to be backed into the siding where
118 the train was?

A. Yes, sir.

Recess taken until 2:00 o'clock, p. m.

Afternoon's proceedings.

119 MICHAEL U. BOEHMER, re-called:

Direct Examination continued by Mr. Sullivan:

Q. When the engine and car had proceeded,—or the engine, on which you were riding, had proceeded to the point where you were passing the switch that would permit it to run back into #1
120 siding, what did you do?

A. I got off.

Q. While the engine was in motion?

A. Yes, sir, while the engine was in motion.

Q. Was that the usual and customary thing for a brakeman to do?

A. Yes, sir.

Q. At what point did you get off?

A. Probably in the neighborhood of 10 or 15 feet beyond the switch.

M. U. Boehmer, re-called for Pltf., Direct.

Q. What did you do? 105

A. Waited until the car cleared the switch, and swung the engineer down.

Q. Then what did you do?

A. Stopped the engine with a stop signal.

Q. What did you use with which to give the signal?

A. Railroad lamp.

Q. What did the engineer do?

A. Stopped. 106

Q. The car was then between you and the engine?

A. No, sir, the car was beyond me.

Q. I know, but the engine was still farther?

A. Yes, sir.

Q. What did you then do?

A. Stepped across the tracks and closed the switch. 107

Q. With what did you close the switch— a switch bar?

A. There is an arm on it.

Q. Which arm?

A. Throwing it one way, regulates the track in one position, and throwing it the other way regulates it the opopsite way.

Q. What do you call the instrument or implement that you threw the switch with? 108

A. Switch lever, I think.

Q. What was the purpose of throwing the switch lever?

A. In order to permit the car and engine to back up to the train.

Q. That is to back up and couple to the rest of the train on this passing siding #1?

125 A. Yes, sir.

Q. On which side of the engine were you riding? Which side of the engine would it be as you faced towards the front of the engine?

A. Those positions—we made the track north and south before recess?

Q. Would you be on the right or left of the engine?

A. I would be on the right side.

126 Q. You told us that was the engineers side?

A. Yes, sir.

Q. Being on that side, after crossing, you had to cross the track for the purpose of getting to the switch lever?

A. Yes, sir.

Q. What did you do then?

A. After seeing the points were in their proper position, I stepped back to the same side I
127 came from.

Q. That would be to the easterly side of the track?

A. Yes, sir.

Q. As we have determined the positions?

A. Yes, sir.

Q. What was the object of your getting back there?

128 A. The instructions say you shall work on the engineer's side, wherever possible.

Q. What did you do then?

A. I gave the engineer the signal to back up.

Q. With what did you give that signal?

A. Railroad lamp.

Q. What transpired while you stood there?

A. Somebody came out of the tower, and ran over to the engine.

Q. Did he hand something to the engineer? 129

A. I surmised that he did.

Q. In other words, it was from that tower that the engineer would get his orders?

A. Yes, sir.

Q. Then what happened? After you saw that occurrence—somebody coming out and having a transaction with the engineer, what happened?

A. He started backing up.

Q. What did you do? 130

A. Attempted to get on the car.

Q. What part of the car did you attempt to get on?

A. The front end, coming towards me.

Q. The end coming towards you?

A. Yes, sir.

Q. And on the same side you were?

A. On the engineer's side. 131

Q. Will you describe to the jury—come down here, and show to the jury, and tell them what you did in getting on the car.

A. I stood there and gave the back-up signal, and as the car came to me I put my right foot up and my right hand up, and attempted to board the car; I didn't get hold of anything, and I fell backwards.

(Witness illustrates). 132

Mr. Adams:

Q. On the side, or the end?

A. Side of the car.

Mr. Sullivan:

Q. What part of the side—what point?

A. Very close to the front.

133 The Court:

Q. When you say the front, do you mean the end?

A. Yes, sir.

Mr. Sullivan:

Q. The end of the car coming towards you?

A. Yes, sir.

Q. How high did you raise your foot?

134 A. About like that. (Shows).

Q. What was the object of your raising your foot so high?

A. Because I was on the car once before, and I knew the step was very high on it.

Q. When you put your hands against the car, where was your lantern?

A. In one of my hands; I cannot recall which one.

135 Q. Is that the customary way of carrying a lantern?

A. Yes, sir; I think it is.

Q. What happened when your hands struck the side of the car?

A. There was nothing there to get hold of.

Q. Was there any handle—handhold or grab-iron there?

136 A. There was not.

Q. Was there any sill step on that car, on that side and end?

A. No, sir, there was not.

Q. What happened then?

A. I fell backwards.

Q. As you fell back what happened?

A. I don't recall.

Q. Was your leg caught?

A. I can't recall that.

Q. Did anything happen to one of your legs?

A. Yes, sir.
Q. What happened to it? 137
A. My foot got crushed.
Q. What crushed it?
A. I suppose the wheel.
Q. Don't you know it was the wheel?
A. The wheel was the only thing that could crush it. My attempt was to save myself; I wasn't paying any particular attention to any one point of my body. 138
Q. What became of your lantern?
A. I guess I throwed it back of me when I fell.
Q. Did you fall prone on your back?
A. Yes, sir.
Q. Was your leg completely cut off?
A. No, sir.
Q. Which leg was caught?
A. This one. (Shows).
Q. The right leg? 139
A. Yes, sir.
Q. Whereabouts was that caught, Mike?
A. As near as I could see, with the shoe and sock and everything in it—
Q. You saw it afterwards?
A. Right through here. (Shows).
Q. On the instep?
A. In the arch. 140
Q. Were you injured any other place?
A. No, sir.
Q. Your body bruised, or your arms, or anything?
A. I didn't have any feeling in these two fingers for some time, but it has returned now. (Shows).
Q. What caused that?

141 A. The doctor thought it was probably from hitting my elbow and gave the nerves a shock.

Q. Was your elbow sore after this accident?

A. These two fingers were numb for a long time.

Q. Did you have pain and soreness in your elbow?

A. I didn't have any feeling at all in this arm.

142 Q. Tell the jury what there was about it—what happened to you then?

A. They took me to the Dunkirk hospital.

Q. What did they do with you before they took you there? Were you bleeding?

A. Yes, sir.

Q. Did the crew come to you?

A. The engineer was the first man came to me.

Q. Then the others came?

143 A. Yes, sir.

Q. What did they do?

A. The engineer tied it and carried me across the track and laid me down alongside, out of the way.

Q About what time of day did this happen to you?

A. Somewhere near 4:00 o'clock in the morning.

144 Q. What date?

A. November 8th, I think.

Q. It was November 7th—the evening of November 7th that you left Oil City?

A. Yes, sir.

Q. Then you went to what hospital?

A. Brooks Memorial.

Q. At Dunkirk?

A. Yes, sir. 145

Q. You arrived there some time early in the morning?

A. After 5:00 o'clock; I don't recall what time

Q. This same train took you on?

A. Yes, sir.

Q. How long were you in that hospital?

A. Seven weeks.

Q. What treatment was given you?

A. They attempted to save the foot for three 146 weeks.

Q. What happened?

A. Gangrene poisoning set in.

Q. What physician did you have?

A. Dr. Richards.

Q. Do you know who employed him?

A. The Pennsylvania Railroad, as I understand. 147

Q. After the gangrene poisoning set in, go ahead and tell us what happened?

A. They saw they couldn't save the foot, and I begged them to amputate it; I was in very severe pain.

Q. What pain did you suffer from that condition?

A. Very severe.

Q. Could you sleep with it? 148

A. No, sir.

Q. Where did it pain you?

A. In the entire body.

Q. What was the nature of the pains?

A. Jerking and jumping.

Q. What was the position they kept your leg in?

149 A. Elevated.

Q. Could you move around in bed?

A. No, sir.

Q. Did you have any weights on it?

A. No, sir.

Q. When did they cut it off?

A. The 22nd day after I arrived at the hospital, if I remember rightly.

150 Q. Where did they cut it, Mike?

A. The end of it is about there; there is the hole in the artificial leg there. (Shows).

Q. About five inches above the ankle?

A. About five or six inches above the ankle.

Q. Did they cut it more than once?

A. Yes, sir.

Q. How many times has it been cut?

151 A. Twice.

Q. The first amputation, and once since?

A. Yes, sir.

Q. How much did they saw off the second time?

A. I have no idea; the doctor never told me.

Q. Where was that done?

A. Buffalo General Hospital.

152 Q. How long were you in the Brooks Hospital all together?

A. Seven weeks.

Q. Were you in bed during all that time?

A. Yes, sir.

Q. Prior to that, and while in the signal service, what pay did you get?

A. 23 cents an hour.

Q. How many hours a day?

M. U. Bochmer, re-called for Pltf., Direct.

A. Occasionally we worked 10, but most of 153
the time 12.

Q. As I understand it, they furnished you a car to sleep in, and a cook?

A. Yes, sir.

Q. What have you done since you were injured, in the way of any employment whatever?

A. None.

Q. Have you engaged in any, or attempted to? 154

A. I attempted to run a pool room.

Q. Was that profitable?

A. It was not; no, sir.

Q. How long did you attempt to do that?

A. About five months, I think.

Q. Do you know of any brakemen or trainmen in the freight service, using artificial legs?

A. I do not.

Q. Had you, while in the service, observed in 155
use, or being hauled on the Pennsylvania Railroad, during your service as brakeman, cars that were not equipped on all four corners, or each side, with handholds, ladders or steps?

Mr. Adams: I object to it, on the same grounds as before.

The Court: I think he is entitled to it; objection overruled. 156

Mr. Adams: Exception.

The Court: Exception noted.

A. I did not.

Q. Had any instructions been given to you, while you were in the service as brakeman, that cars without handholds and steps on each side, and all four corners, would be used in the trains that you were to operate?

M. U. Boehmer, re-called for Pltf., Cross.

157 Mr. Adams: I object to it as incompetent, immaterial and irrelevant.

The Court: Do you claim it?

Mr. Sullivan: I claim the right to that question; certainly.

The Court: Objection overruled.

Mr. Adams: Exception.

The Court: Exception noted.

158 Q. You may answer.

A. I did not—I never received any instructions.

Q. Were you ever warned that you would be expected to work in and about any cars that were not equipped with handholds and sill steps on the outside, and all four corners of the car?

Mr. Adams: I make the same objection.

The Court: Same ruling.

159 Mr. Adams: Exception.

The Court: Exception noted.

A. No, sir, I was not.

CROSS EXAMINATION by Mr. Adams:

Q. Mr. Boehmer, were you born in Buffalo?

A. No, sir.

Q. Where were you born?

160 A. Victoria, Mercy County, Ohio.

Q. How long did you live there?

A. Until I was about eight or nine years old.

Q. Went to public schools there?

A. Yes, sir.

Q. You were always a good, strong, healthy boy?

A. Considered as such.

M. U. Boehmer, re-called for Pltf., Cross.

Q. Always got along well in your school? 161
A. Yes, sir.
Q. Up to what age did you go to school?
A. 13.
Q. You were in grammar school then, as we call it?
A. 4th grade.
Q. Then you quit school and went to work?
A. Yes, sir. 162
Q. Where did you go to work?
A. Went to work at the Lima Steel Casting Co.
Q. That is at Lima, Ohio?
A. Yes, sir.
Q. How long did you work there?
A. I haven't any recollection.
Q. You can tell whether two months or two years, can't you?
A. I can come that close. 163
Q. Give us your best recollection in regard to it?
A. About four months.
Q. There you worked about machinery?
A. Yes, sir.
Q. Where did you work next?
A. Carrying newspapers, I think.
Q. Where was that? 164
A. Same place.
Q. How long did you work at that?
A. Possibly a year.
Q. Exclusively at that?
A. Whatever else I could get to do—running errands, etc.
Q. Did you go to school some?

165 A. No, sir.

Q. When you got through with the newspaper business, what did you do?

A. You must give me time to think. I don't recall what I did then; I went to my grandmother's, on the farm.

Q. And stayed there for a while?

A. Yes, sir.

166 Q. When did you come to Buffalo, or this part of the country?

A. I came here—I don't remember exactly.

Q. How old were you?

A. When I came to Buffalo?

Q. Yes?

A. I had only been in Buffalo once, before I was injured.

167 Q. I mean in this part of the country—Corry, or wherever you lived?

A. I came there about two weeks before I went to work for the Pennsylvania.

Q. You were then in the neighborhood of 30 years old?

A. Yes, sir.

Q. Had you been working all that time? From 13 years of age, up to the time of this accident,

168 you were a working man, I take it?

A. Yes, sir.

Q. Had you ever worked for a railroad before?

A. No, sir.

Q. What had you been doing, generally?

A. Farming, carpenter work, and driving team.

M. U. Boehmer, re-called for Pltf., Cross.

Q. How long had you worked as carpenter? 169

A. I didn't work at it steadily for any great length of time. My father was a contractor, and when I didn't have anything else to do, I worked for him.

Q. For a period of approximately 15 years, you had been earning your own living by working, hadn't you?

A. Yes, sir. 170

Q. And you were pretty familiar with the dangers that surround men when they are employed, I suppose?

A. To a certain extent; yes, sir.

Q. You say the Pennsylvania was the first railroad you worked for?

A. Yes, sir.

Q. You went to work for the Pennsylvania as signal maintainer? 171

A. Not as maintainer.

Q. In the signal department?

A. Yes, sir.

Q. You were working under one of the signal maintainers?

A. No, sir, I was working under the supervisor of signals.

Q. That is the same thing, isn't it? 172

A. No, sir; a signal maintainer travels considerably.

Q. How long did you work at that job?

A. From the time I hired out until I went braking.

Q. How long?

A. From November of one year, until September of the next, I think.

M. U. Boehmer, re-called for Pltf., Cross.

173 Q. Practically a year?

A. About that.

Q. That was all on the track, wasn't it?

A. Yes, sir.

Q. You had to do with the putting up of semaphores?

A. Yes, sir.

Q. And crossing bells. Did you put them in?

174 A. No, sir.

Q. Your work had to do with the automatic train signal system?

A. Yes, sir.

Q. Did you put in the dwarf signal, and switches, and things of that sort?

A. Very rare occurrences.

Q. During this entire year you were working around the railroad yards and railroad tracks?

175 A. No tracks; we worked between Corry and Oil City, putting in new towers.

Q. You had plenty of opportunity to observe freight trains, I suppose?

A. When they went by.

Q. You considered yourself pretty well informed as to railroads in general,—railroad service, did you not?

176 A. I don't know; I don't understand the question.

Q. You went to Mr. Rupert and asked him to let you go braking?

A. I did.

Q. He told you you could?

A. He said, if I could pass the examination, I could.

M. U. Boehmer, re-called for Pltf., Cross.

Q. You took the examination? 177
A. Yes, sir.
Q. And you passed it?
A. Yes, sir.
Q. Who gave you the examination?
A. Some doctor in the relief office; I don't remember his name.
Q. He gave you a physical examination, and somebody gave you an examination in regard to 178
railroading too, didn't they?
A. Not that I know of.
Q. What was your first duty?
A. What do you mean?
Q. As brakeman?
A. I worked in the Oil City "turn job,"—Corry to Oil City.
Q. That was a road job?
A. Yes, sir. 179
Q. How long?
A. 10 or 12 days.
Q. Every day?
A. Yes, sir.
Q. That was between what points?
A. Between Corry and Oil City.
Q. That involved more switching than the job you were on the night you were hurt? 180
A. Never involved any switching, except on our return, when we set off to Buffalo, perhaps, and Titusville.
Q. You were doing switching, more or less, on that job?
A. No, sir.
Q. You were drawing freight cars, weren't you?

M. U. Boehmer, re-called for Pltf., Cross.

181 A. That didn't necessarily involve the question of switching.

Q. You were drawing freight cars?

A. Yes, sir.

Q. Between Oil City and Corry?

A. Yes, sir.

Q. What were you doing?

A. Drawing them from Corry to Oil City.

182 Q. What did you do with them when you got them to Oil City?

A. Left them on one track, and released the engine, and came back and got trains.

Q. You rode on those trains on those days?

A. Yes, sir.

Q. Of course, you did not look at any of the cars, did you?

A. Only those I wanted to get on.

183 Q. Did you ever see a freight car, and examine it closely, Mr. Boehmer?

A. I did not.

Q. Never did? You want to tell the jury that you never examined any freight cars, do you?

A. I never had any reason to.

Q. You were a brakeman, riding on these trains?

184 A. Yes, sir.

Q. You never took the trouble to look to see how those freight cars were equipped, did you?

A. They go right by, and you don't necessarily have to stop to make a perfect inspection of them.

Q. You never made any particular inspection of them?

A. I did not.

Q. Still, at the time of this accident, you threw yourself against the side of that car, didn't you, without looking to see whether there was anything there or not? 185

A. I didn't throw myself against the side of any car.

Q. Against the end of the car?

A. Nor against the end of it either.

Q. I beg your pardon. I thought that was what you testified to? 186

A. I did not.

Q. You say you never received any instructions at all in regard to freight cars?

A. Yes, sir—I didn't say that; I said I never received any instructions—

Q. In regard to safety appliances?

A. No; to the best of my knowledge, I did not.

Q. Never had any instructions as to what cars were equipped and what were not? 187

A. No, sir, I did not.

Q. And you never had looked at the cars to see what they were equipped with?

A. No, sir.

Q. Of course, your duties as brakeman required you to climb about and over cars, more or less, didn't they? 188

A. Yes, sir.

Q. To go up and down the ladders?

A. Yes, sir.

Q. To use the grab irons on top of the cars?

A. Yes, sir.

Q. And to use the sill steps?

A. Yes, sir.

189 Q. And the grab irons on the sides?

A. Yes, sir.

Q. Do you know whether the grab irons on the sides were put on up and down, or lengthwise?

A. Lengthwise?

Q. Yes?

A. All those I came in contact with.

Q. You do not know whether some of them

190 are put on up and down, or not?

A. Not positively; no, sir.

Q. On this night in question, you say the work was about the same as you had been doing all the while you were on the "turn job" to Corry?

A. I don't think I said that.

Q. I so understood it. Is that so, or not?

A. Will you please give me that question again?

191 Q. The work you had to do on this train, from Corry to Buffalo, was practically the same as a brakeman would have to do on the other jobs that you did?

A. Yes, sir.

Q. Were you head brakeman or flagman?

A. Head brakeman.

Q. So that you never had to go back with any

192 flag that night?

A. No, sir.

Q. Your duty was to ride on the train, and to do whatever was necessary to be done?

A. Whatever the conductor instructed me to do.

Q. That was the way you were doing your work right along—as long as you worked there?

A. Yes, sir.

M. U. Boehmer, re-called for Pltf., Cross.

Q. You say, as you approached Brocton, you got an order to take a car of grapes from the Nickel Plate Railroad, did you? 193

A. I said we got an order to pick up grapes at Brocton.

Q. Was that a carload of grapes, or grapes on the ground?

A. When we got there, it was one car.

Q. It was a carload of grapes then? 194

A. Yes, sir.

Q. That you were going to get from the Nickel Plate Railroad?

A. Yes, sir.

Q. All these tracks are Pennsylvania tracks, aren't they,—up to here; (shows) Tracks 1, 2, 3 and 4 are Pennsylvania yard tracks?

A. I wouldn't be positive.

Q. The Pennsylvania uses them right along? 195

A. I don't know.

Q. You came off the main line right here? (shows).

A. No; farther back, I think.

Q. There is another switch back there farther? (Shows).

A. I think there is.

Q. You came in on passing siding #1, headed north? 196

A. Yes, sir.

Mr. Sullivan: The map does not extend far enough to the west, or south, to include that connection.

Q. You came in on passing siding #1, headed north?

M. U. Boehmer, re-called for Pltf., Cross.

197 A. Yes, sir.

Q. And your engine cut off from the main train?

A. Yes, sir.

Q. Cut off just at the south of the road crossing?

A. Not the first time.

Q. Where did it cut off?

198 A. Cut off beyond that switch up there. (Shows).

Q. Then the engine went in on #2?

A. No, sir.

Q. Where did it go in?

A. I guess it came down to that switch, and crossed back there somewhere. (Shows).

Q. Where is the water plug?

A. Up in there. (Shows).

199 Q. Off the map?

A. It is not on here.

Q. You stopped there long enough for the engine to get water?

A. Coal and water.

Q. Then the engine came and coupled on the train, and pulled it in on passing siding track #1, on that map?

200 A. Yes, sir.

Q. You were headed north?

A. Yes, sir.

Q. Then the engine ran down onto the lead track at the north end of the yard?

A. Yes, sir.

Q. Then in through #3 (Shows).

A. Yes, sir.

M. U. Boehmer, re-called for Pltf., Cross.

Q. And over here to where it says "To Erie," on this map? 201

A. I guess that is the point.

Q. Then you crossed over there across to the Nickel Plate?

A. Yes, sir.

Q. Having gotten your orders first?

A. Yes, sir.

Q. You took care of this main track switch here? (Shows). 202

A. The main track of the Nickel Plate switch.

Q. That is all you had to do while you were over there?

A. Yes, sir.

Q. All you know about it is that the engineer and the other brakeman went over there and got that car and brought it over there by you? (Shows). 203

A. Yes, sir.

Q. Then you set the switch back—closed it—to the main line?

A. Yes, sir.

Q. After they passed in there?

A. Yes, sir.

Q. Is that right?

A. Not after they passed in. 204

Q. After they passed out?

A. Yes, sir.

Q. And passed back into Pennsylvania territory?

A. After they got through with that work.

Q. Then the engine was still headed south?

A. Towards Buffalo.

M. U. Boehmer, re-called for Pltf., Cross.

205 Q. Headed towards Buffalo?

A. Yes, sir.

Q. What track did it go through to the north from?

A. The same one we went back on.

Q. #3?

A. Yes, sir.

Q. Headed down #3?

206 A. Yes, sir.

Q. You were then out of the way of the Nickel Plate?

A. Yes, sir.

Q. You had no further complications with the Nickel Plate after you closed that switch?

A. No, sir.

Q. So that you were back safely and happily on the Pennsylvania side of the Nickel Plate?

207 A. Yes, sir.

Q. And you had nothing to worry about as far as the Nickel Plate was concerned?

A. Not after those switches were closed.

Q. Then all you had to do was take that car back and couple onto the main train?

A. Yes, sir.

Q. You had no responsibility for the orders, of

208 course?

A. No, sir.

Q. As far as you knew, there was no particular hurry there; is that right?

A. We are always in a hurry on a railroad.

Q. There was no unusual hurry?

A. If you didn't get it over there, they would want to know why you were not there.

M. U. Boehmer, re-called for Pltf., Cross.

Q. You were not on the road yet? 209

A. Yes, sir; but the detention was there, and they want you to keep on moving.

Q. And you went through track #3, clear of that switch there—through here, and clear of the switch leading to #1? (Shows).

A. Yes, sir.

Q. The engine was back down here? (Shows).

A. Yes, sir. 210

Q. Here is the place where the accident happened? (Shows).

A. Yes, sir.

Q. I will make a cross there. (Shows).

A. I wouldn't be sure it was right exactly there.

Q. Approximately. That is the switch there? (Shows).

A. That is the switch. 211

Q. After the engine had cleared that switch to the north, it stopped there a while?

A. Not for a while—for a minute or so.

The Court: Which switch to the north?

Mr. Adams: Where the cross mark is.

Mr. Sullivan: We consider the tracks as north and south; they are not really north and south, but railroad men consider them 212 as north and south tracks.

The Court: The points of the compass are different? As long as it is understood the right hand of the map, is north, and the left hand, south—

Mr. Sullivan: Yes, sir; that is the understanding.

213 Q. It was a cold night, wasn't it—kind of cold?

A. The fall of the year; it was chilly.

Q. Do you remember walking up and down there a few times?

A. I remember stamping my feet.

Q. How long do you think that engine and car stood there?

214 A. It appeared to be a good while—two minutes.

Q. At least two minutes?

A. I wouldn't say at least; I said about that.

Q. You did not have anything to do during that time?

A. I had to step across and throw the switch, and see the switch points were right, and step back there.

215 Q. Did you see the engineer and conductor go into the block station?

A. I did not.

Q. You think the engine and car stood there about two minutes, do you?

A. About that.

Q. During that time you were walking about there, trying to warm up a little, were you not?

216 A. After I stepped across the track, I stamped my feet up and down that day. (Shows).

Q. And ran back and forth a little?

A. No, sir, I didn't run back and forth.

Q. You are sure about that?

A. Positive.

Q. You had a lantern in your hand?

A. Yes, sir.

M. U. Boehmer, re-called for Pltf., Cross.

Q. That was one of the big railroad lanterns? 217
A. Not a big lantern; it is a regular standard.
Q. That is a lantern that you could give signals with for half a mile?
A. Maybe farther than that; I don't know.
Q. It has got a reflector on the back?
A. No, sir, it hasn't.
Q. Just an ordinary lantern?
A. Yes, sir.
Q. This car had passed you two or three times 218
before?
A. I don't know whether it had or not.
Q. It passed you when it came over there at the Nickel Plate?
A. I was on the opposite side of it then.
Q. Did you ride it over there?
A. I got on it and set the brake on it.
Q. You were on the opposite side then? 219
A. You said the lake was to the west?
Q. Yes?
A. I was on the west side of it.
Q. You did not examine it particularly?
A. No, sir.
Q. Except you noticed that the step, you say, was different than it had been on some of the other cars; is that right? 220
A. When I got on it, I noticed the step.
Q. And the step was higher?
A. And the ground might have had something to do with that too.
Q. Didn't you say it was different from the other cars?
A. I said it was a small step.

M. U. Boehmer, re-called for Pltf., Cross.

221 Q. Did you notice that it was a foreign car?

A. No, sir; I did not.

Q. You did not look to see?

A. No, sir.

Q. But you noticed that it was different—it was equipped differently than the Pennsylvania cars, for instance?

A. Yes, sir.

222 Q. But it had grab irons on the diagonal corners?

A. I couldn't say as to that.

Q. As far as you know, it did?

A. It had a grab iron on the corner I got on the first time.

Q. As you came back there—as you came back over the Nickel Plate, you got on which side—right or left side?

223 A. As I came back over the Nickel Plate?

Q. That would be the west side; that would be the right side—that would be the left side?

A. Left side. I walked from there—after I closed that switch, I walked from there to the switch that left us in on #3 track. (Shows).

Q. You could walk about as fast as they went with that train?

224 A. It is only a step or two, diagonally across there.

Q. The head end of that train—when you threw that switch, the head end of the train of cars was about in there somewhere? (Shows).

A. I guess about four or five car lengths back of that road crossing, when we cut off.

Q. And you were down here at this switch? (Shows).

M. U. Boehmer, re-called for Pltf., Cross.

A. Yes, sir. 225

Q. That was about six or eight car lengths from the highway crossing.

A. I have no idea how much it was.

Q. Do you know what the scale of this map is?

Mr. Sullivan: One inch to 20 feet.

Q. You stood there, and after this wait of two minutes, you gave a signal with your lantern to back up? 226

A. I was giving it a continuous signal after I closed and locked the switch, and stepped back to the engineer's side.

Q. How far were you from the car when you stepped across?

A. Probably a couple of car lengths.

Q. You could see the engine there and the car?

A. Yes, sir.

Q. A couple of car lengths away? 227

A. I could see the outline of it.

Q. You could see the outline of it?

A. I couldn't see it distinctly.

Q. You gave a signal for it to come ahead?

A. Back.

Q. To back?

A. Yes, sir.

Q. And it came towards you slowly? 228

A. Yes, sir.

Q. You say you made a jump for that car?

A. I didn't make any jump for it; no, sir.

Q. Was there any way you could get on a moving car like that—get on the step—without making more or less of a jump?

A. It is a kind of a slide—it is a crooked jump. (Shows).

M. U. Boehmer, re-called for Pltf., Cross.

229 Q. You put your lamp up too—somewhere on the side of that car, didn't you?

A. Close to the end.

Q. You were not in front of the car?

A. No, sir, I wasn't in front of the car.

Q. You were alongside of it?

A. I was alongside of it.

Q. So that your hands went up against the end
230 of the side; is that right?

A. What's that?

Q. Your hands, as you went up there, went against the end of the car—the side of the end?

A. On the side; yes, sir.

Q. Outside of the corner?

A. Yes, sir.

Q. You did not get in—what would be between two cars if they were together?

231 A. No, sir.

Q. You were on the outside?

A. I was.

Q. Did you look to see if there were any grab irons there?

A. No, sir.

Q. Did you look to see if there was any sill step there?

232 A. No, sir.

Q. You discovered there were none there?

A. To my sorrow; yes, sir.

Q. You say you never had been told not to try to climb up on cars where there was no ladder?

A. No, sir.

Q. Did you ever try it before that?

M. U. Boehmer, re-called for Pltf., Cross.

A. No, sir. 233

Q. As I understood it, at the outset you testified you never had made particular observations yourself in regard to these cars,—foreign or domestic?

A. No, sir; no thorough inspection.

Q. The only thing you noticed about this one was that the sill step, as you got onto it, was different from those on the Pennsylvania Railroad cars—higher? 234

A. Yes, sir.

Q. Is that your signature?

(Witness shown a paper).

A. Yes, sir.

Mr. Adams: I ask to have this paper marked for identification.

Paper marked Defendant's Exhibit #1, for identification. 235

Q. Do you remember telling Mr. Masten, here, that at the time you gave the signal, the car was only half a car length away from you?

A. No, sir.

Q. You don't remember that?

A. No, sir, I don't.

Q. You have a copy of the Book of Rules?

A. Yes, sir. 236

Q. You are familiar with them?

A. Not overly.

Q. Did you have a copy of this book?

(Witness shown a book).

A. I don't recall that; I may have; I can tell by looking it up; I have all my books here,—if I have it.

237 Mr. Adams: I ask that it be marked for identification.

Book marked Defendant's Exhibit #2, for identification.

Q. You had a copy of this Book of Rules here?

(Witness shown another book).

A. One like that; yes, sir.

Mr. Adams: I ask that it be marked for identification.

238 Book marked Defendant's Exhibit #3, for identification.

Q. After this accident, you were taken to the hospital and attended by Dr. Richards?

A. Yes, sir.

Q. Briefly speaking, he tried to save your leg and foot in the first instance, and found out that he could not, and amputated it?

239 A. Yes, sir.

Q. Then you were further treated by Dr. Parmenter and Dr. Clinton?

A. Yes, sir.

Q. Those were doctors furnished by the Pennsylvania Railroad, I take it?

A. Yes, sir.

Q. You have never had any expense at all in connection with your leg, have you?

240 A. Yes, sir I have.

Q. I mean as far as doctors are concerned?

A. No, not exactly for doctors.

Q. You say that stump now is getting better?

A. Yes, sir.

Q. Of course, you expect, after awhile, to get used to that leg, so that you can use it without any trouble?

A. I hope to. 241

Q. You understand, of course, that a man that uses an artificial limb—that it takes quite a little time getting used to it, so that he can use it; is that what the doctors told you?

A. Yes, sir, they all say that.

Q. And you are gradually getting used to your artificial foot?

Q. You can use it much better now than you could when you first got it? 242

A. Not so much, but there is a slight improvement.

Q. How long did you say you had it?

A. The leg?

Q. Yes?

A. About six weeks.

Q. Is that one of the automatic kind, with a spring in the heel? 243

A. The heel moves, if that is what you mean. (Shows).

Mr. Adams: That is all.

RE-DIRECT EXAMINATION by Mr. Sullivan:

Q. How is that leg attached?

A. It has a corset here, and a strap around the shoulder— a strap leading from here to here, 244 over the shoulder.

Q. There is something around your foot?

A. Yes, sir.

Q. What is that?

A. A socket; there is a corset here, of leather; goes from here to here. (Indicates).

Q. How much of it is leather? All the way around your leg?

245 A. Yes, sir.

Q. Does that go on the inside too?

A. Yes, sir.

Q. What is that thing there? (Shows).

A. The knee joint. That is my own knee, and it has a steel joint on the leg.

Q. What is that hard substance there?

A. Wood.

246 Q. How thick is that? Can you lift that up, so that we can see it?

A. It is pretty hard to lift it up.

(Witness exhibits artificial leg).

Q. Does the stump of your leg extend down in there?

A. Yes, sir.

Q. Can you put it up there on the table?

A. (Shows).

247 Q. What is that in there?

A. A stocking, that I wear on the stump.

Q. And the stump is about one-half or an inch above that?

A. Yes sir, about in there. (Shows).

Q. About up to there?

A. About there.

Q. Does that heat your leg? Do you feel that it is warm?

248 A. Yes, sir; very irritable; they tell you so when they sell it to you; in the summer time they are terribly hot.

Q. Where do the bands go around you?

A. This way. (Shows).

Q. Are they under your clothes? Open your vest. How much of a band is that?

(Witness exhibits bands, etc.)

Q. Is there one on the other side?

A. No, sir, there is only one. 249

Q. How does the strap come down behind—hook on behind?

A. No, sir, only in front.

Q. Is that the only connection it has to it?

A. Yes, sir, to there. (Shows).

Q. Is that all?

A. Outside of that leather corset around the entire leg there. (Shows).

Q. Is that tight around the leg? 250

A. It laces all the way up.

Q. Do you bind it down onto the muscles of your limb?

A. Yes, sir.

Q. Mike, if you will turn around here and look at this map—you saw counsel put a mark on this map as indicating the point where the accident happened? (Shows). 251

A. Yes, sir.

Q. Did the accident happen on that side of the track, or the other side of it?

A. The other side.

Q. I am calling your attention, so that there will be no confusion in the future.

Mr. Adams: I do not claim the cross was put in the exact place; I just wanted to identify the switch there. 252

Mr. Sullivan: All right.

Q. Counsel asked you if you tried to climb on a car without a ladder before, and you answered "No, sir"?

A. Yes, sir.

Q. How came it that you never tried to climb on a car without a ladder or handle before?

253 A. Because I never came in contact with a car of that kind before.

Q. Is this the Book of Rules that was given you?

(Witness shown a book).

A. Yes, sir.

Mr. Sullivan: I offer it in evidence.

Book of Rules received in evidence, without objection, and marked Plaintiff's Exhibit #2.

254

Q. Counsel asked you if you didn't have a lantern on this occasion?

A. Yes, sir.

Q. What is the use of lanterns in railroading?

Mr. Adams: I object to it.

The Court: What is the purpose of this?

Mr. Sullivan: If he is going to urge that this man should have a lantern, and look at the cars when they came to him, to see whether or not there were grab-irons or steps there, I want to show that no railroad man could stand for a day if he attempted any such thing; if he is going to make that claim I am entitled to have this witness explain the uses of the lantern.

255

The Court: Read the question.

256

(Question read by reporter).

The Court: He may answer it.

Mr. Adams: I object to it as incompetent, immaterial, irrelevant, and not a subject for expert testimony, and calling for a conclusion.

Mr. Sullivan: I am asking for his observations, and the instructions given him.

The Court: It should appear that he knows, first. 257

Q. Does that Book of Rules, put in evidence here, indicate and give instructions as to the use of lanterns?

A. It does.

Q. Is there anything in this Book of Rules, or any rules, which instructs the brakeman to look—to use the lantern to look for grab-irons or sill-steps? 258

Mr. Adams: I object to it on the ground that the Book of Rules speaks for itself; further, on the ground that it is a matter of common knowledge, and if there is any question about it, it is for the jury to say what the lantern is to be used for.

The Court: The difficulty is that counsel got the notion that from your questions to this witness, it may be fair to infer that he should take the lantern and walk up to the car and look it over and first ascertain whether there was any grab-irons on it or not; I do not think you intended that, but counsel fears you may have. 259

Mr. Sullivan: And he will disclaim that he did intend it I will proceed with another line. 260

The Court: All right.

Q. How high above the bed of the track, or ground, are the grab-irons and hand-holds on the sides of the car,—about?

Mr. Adams: On this particular car, or what?

Q. The ordinary cars—the ordinary place?

A. I should say between four and five feet.

261 Mr. Adams: Do you mean the grab-irons?

Mr. Sullivan: Grab-irons and hand-holds; I suppose they mean the same thing.

Q. How high are the steps, ordinarily above the ground—the bottom of the step—the end of the sill-step?

A. About 28 or 30 inches, possibly.

262 Q. What kind of oil is burned and used in a railroad lamp?

A. Lard oil, I think.

Q. Is that a heavy oil?

A. Yes, sir.

Q. What is the character of the light, and its intensity?

Mr. Adams: I object to it; there is no evidence that this man is qualified as an

263 expert.

The Court: Admitted.

Mr. Adams: Exception.

The Court: Exception noted.

Q. What kind of light does that give?

A Give a very dim light.

Q. When you are about to board a car approaching, as this car did, and you swing your arm forward, where does it bring the lantern in

264 reference to your body?

A. About there. (Shows).

Mr. Adams: Right in front of you?

Q. So that the light would be between you and the side of the car as it approached you?

A. Yes, sir.

Q. How did you, when you boarded cars, know—which appliance did you first touch with your body—the grab-iron or step?

Mr. Adams: I object to it on the same 265
grounds as before.

The Court: Objection overruled.

Mr. Adams: Exception.

The Court: Exception noted.

A. Momentarily, with the hand, a fraction ahead of the foot.

Q. As a car was approaching you, if you had used your lantern to observe and look with the light ahead of you, to see if there was a grab-iron 266
and step on it, and then, after ascertaining there were, if you had attempted to board that car, what would you have to do with your lantern?

Mr. Adams: I object to it as calling for a conclusion of the witness, speculative, and argument.

The Court: He is entitled to it.

Mr. Adams: Exception. 267

Q. (Question read by reporter). Assuming this is the lantern, and this is the side of the car (shows), will you illustrate to the jury what would happen?

Mr. Adams: I object to what would happen, as speculative.

Q. I mean what motions the lantern would go through.

Mr. Adams: I object to it. 268

The Court: Change the form of your question. Read the original question.

(Original question read by reporter, also the addition to the question).

The Court: The question is, "What would happen"?

A. I would be giving the "Go ahead" signal

269 Q. How?

A. That way. That is the correct "Go ahead signal" (shows).

Q. You first raise your lantern to the point where you can see if there was a grab-iron, and then drop it to see if there was a step, and then raise it, as you would have to in boarding the car, and you would be giving the engineer the "Go ahead" signal? (Illustrates).

270 A. Yes, sir.

Q. That is the signal indicated and illustrated by the picture on page 58 of this Exhibit #2,—the Book of Rules? (Shows).

A. Yes, sir.

Q. Now, I will ask you if you had ever seen—were you ever instructed, by any person, to use your lantern for looking for grab-irons or steps

271 on cars?

A. No, sir, I was not.

Q. Did you ever see, in your observation and time as a railroadman, any trainman, or brakeman, or conductor ever doing any such thing?

Mr. Adams: I object to what other men did.

The Court: The question is whether he ever saw them doing it. Objection over-

272 ruled.

A. No, sir, I did not.

Mr. Sullivan: That is all.

RE-CROSS EXAMINATION by Mr. Adams:

Q. You never used your lantern to see with, did you, for any other purpose?

A. Not the railroad lantern, if that is what you are referring to.

M. U. Boehmer, re-called for Pltf., Re-cross.

Q. Traveling back and forth between Buffalo and Corry, on the tracks, at night, you say you never used the lantern to look and see with—did you? 273

A. No, sir.

Q. You never looked for car numbers with the lantern?

A. No, sir.

Q. You never looked for engine numbers with a lantern? 274

A. No, sir.

Q. You never looked to see whether there was a door flopping, with a lantern?

A. No, sir.

Q. You never looked at time slips with a lantern?

A. Yes, sir.

Q. You have done that? 275

A. Yes, sir.

Q. I suppose you had to hold them pretty close to it?

A. We do that in the cabin.

Q. You want to tell these twelve men here, that there was not light enough from that lantern so that you could see whether or not there was a grab-iron on that car ten feet from it?

A. No, sir, there was not. 276

Q. There was not light enough?

A. No, sir.

Q. You want to tell the jury that?

A. Yes, sir.

Q. Under oath?

A. Yes, sir, I do.

Q. You want to tell the jury, that in order to

277 see you would have to hold your lantern right up close, and run it up and down the side of the car; is that right?

A. If you wanted to see in both places, you would; yes, sir.

Q. But you did not see them that night, did you?

A. No, sir.

278 Q. You say that train was going slowly?

A. It was.

Q. It wasn't going any faster than you could walk?

A. I didn't say that.

Q. It had not been going very far, had it?

A. It didn't have very much start there,—but with one car you can get quite a little speed; you don't have no great lengthy train to start.

279 Q. The grab-iron is about opposite the shoulder, when you are standing alongside of a car,—if there was one there?

A. A little higher, if anything.

Q. Were you ever told not to get hold of the grab-iron first, before you jumped?

A. No, sir.

Q. Was there anything to prevent your get-
280 ting hold of the grab-iron while you stood with your feet on the ground, if there was one there?

A. What is that?

Q. Was there anything to prevent your taking hold of the grab-iron before you put your foot up?

A. If there was any speed there, you would be jerked all over the ground—if you are not prepared for it.

M. C. Boehmer, re-called for Pltf., Re-cross.

Q. Was there anything to prevent your taking hold of that grab-iron, that night, first? 281

A. You do the same at all times; you don't change.

Q. Was there anything to prevent your taking hold of the grab-iron, that night, before your feet left the ground?

A. I think I have explained it to the best of my ability.

Q. You do not want to answer the question? 282

A. I don't understand the question; make it clear, and I will answer it, if I can.

Q. You say you did not jump, did you?

A. I was prepared to jump, but I did not jump at the side of the car, as you said.

Q. You say you lifted up one foot?

A. Yes, sir.

Q. One foot was on the ground, and the other lifted up— 283

A. Ready to get on the car; yes, sir.

Q. You did not have hold of anything at that time?

A. No, sir.

Q. You stood there balanced on one foot—

A. You don't have to stand half an hour, balanced on one foot, you can prepare yourself in an instant. 284

Q. You did not jump?

A. No, sir, I didn't jump.

Q. Then you stood on the ground, balanced on one foot, for a while?

A. Not for a while.

Q. Were both feet off the ground?

285 A. No, sir.

Q. Were both feet on the ground?

A. That night?

Q. At the time you tried to make this strange movement?

A. No, sir, they were not.

Q. Then you stood on one leg, for some time, did you not?

286 A. Yes, sir, but not for a great while.

Q. You did not know at that time whether there was a grab-iron there or not?

A. I did not; no, sir.

Q. Did you ever throw your lantern on your elbow?

A. I guess I did.

Q. Don't you know about that?

287 A. What do you mean? Did I ever carry the lantern on my elbow?

Q. Yes?

A. Yes, sir, I did.

Q. But this night you had it in your hand, didn't you?

A. It seems to me I did.

Q. Your lantern, as you had your hands up there—did you have them both up?

288 A. Yes, sir.

Q. Your lantern, you say, would be right in front of you,—between you and the car?

A. Not necessarily right in front of me; it would be between me and the car.

Q. It was an ordinary railroad lantern?

A. Pennsylvania stamp.

Q. You were never instructed not to use it

for lighting purposes, if you needed a light, were you? 289

A. No, sir.

Q. But you say they never told you to use your lantern to look and see if there were grab-irons on the side of the car?

A. No, sir.

Q. And they never told you—instructed you not to try and climb up a ladder where there was none? 290

A. No, sir.

Q. You never had been told that?

A. No, sir.

Q. You say you are positive they never told you to use your light to look and see if there was a ladder; you are positive of that, too, are you?

A. What's that?

Q. (Question read by reporter). 291

A. That I was never instructed to use my lantern to see if there was handholds or stirrups.

Q. Did you ever consider it was necessary to know whether there was a ladder or grab-iron, or not, before you tried to use them?

A. I always found one there.

Q. But you never looked to see whether there was one there or not, before you tried to use it? 292

A. No, sir.

Q. You want to make that statement under oath, here to the jury?

A. Yes, sir.

The Court:

Q. Won't you please step down over there in the farther corner? In the questions asked by

293 counsel, and the answers of the witness, there has been so much "here" and "there" that it seems to me we have an indefinite situation, that counsel knows well, and the witness, but I am frank to say I do not. In answering my question, I am going to ask, instead of saying "here" and "there",—which means nothing,on the record,—I am going to ask you to begin at the south end of
294 those tracks, and trace the movements of your train as it came in there, and as it moved back and forth,—pointing out where the switches are, and indicating with that pointer and in words, exactly how the whole transaction transpired on the night in question; do that in your own way, without interruption from counsel or court. Stand as far back as you can, so that the jury can see.

295 A. We came from this direction, and fetched our train in there (shows).

Q. "This direction" does not mean anything on this record?

A. What shall I say?

Q. From the east, as you understand it, or the west, or north, or south.

A. We came from the south, and went north; is that right?

296 Q. Yes.

A. We came from the south, and pulled in on this siding; cut the engine off—

Q. "This siding;" that is marked; indicate it?

A. Passing siding #1. Cut the engine off; I remained with the train, while the other brakeman took the engine and went to get coal and water.

Q. Where? 297

A. Up here; it is not marked on the map (shows).

Q. Trace the movements of that engine?

A. It is hard to do it; I wasn't with the engine.

Q. The engine was cut off, and got coal and water?

A. She returned and coupled onto the train; 298
pulled into passing siding #1; pulled down to within about five car lengths possibly of that road crossing; cut the engine off, and pulled down to clear that switch there.

Q. Indicating the north end of the map?

A. Yes, sir, indicating the north end of the map. I received orders there to go over to the Nickel Plate transfer track and pick up one car of grapes. That switch was thrown, bringing us 299
back into track #3,—which is lined up continuously; they use that for an inside passing siding, and it is kept clear for that purpose. We passed through #3, back to this switch here (shows).

Q. At the south end of the map?

A. At the south end of the map. This switch was thrown and we proceeded onto this cross-over, and onto the Nickel Plate main track, at the 300
south end of this map. I stayed at this switch while the other brakeman performed those operations of getting this car out of there. After the car came towards me, I was on the west side of the Nickel Plate main track. I boarded this car on the southwest corner, by the position of this map; I got up on top of it and set the brake;

301 brought it to a permanent stop, and released the brake; came back down the same way I went up, and walked back to the switch right there, on the south end of this map, and throwed that switch, which permitted the engine to come back and couple onto the car. There are two switches right there together; one leads in that way, and the other leads the other way—marked here "West
302 Bound." That is what is called the cross-over switch. The other brakeman brought the engine back, and coupled onto the car. I adjusted that switch so that it was O. K. for the Nickel Plate main, and he backed up and cleared this switch; I walked from that switch, over there, on the engineer's side, (shows) which would be the east side of the map; I boarded the tender at the rear end of the engine, on the engineer's side, and rode in that
303 position through this track #3, down to that point on the north end of this map;—to the switch that let us into the passing siding; I got off, and after the car pulled clear of me, I swung the engineer down. I stepped across the track,—which would be to the west side,—the switch side is on the west,—adjusted the switch, looked at the switch points and saw they were O. K., and step-
304 ped back over onto the east side—the engineer's side, and gave him the back-up signal. When he came back, I attempted to board the car as it came towards me, with my right foot—I don't recall whether I had both hands or one hand—possibly one—but I attempted to board it with my right foot.

Q. The southwest corner of the car?

A. Yes, sir—the southeast corner of the car; 305
I missed the stirrup and handle, and the injury occurred.

Q. That is getting to the point of the injury; that is what I wanted. That is all.

A. Yes, sir.

Mr. Adams, resuming:

Q. Just one or two questions now, to finish that up: the only further movement you had to 306
make at the time this accident occurred, was to run down the engine and car onto passing siding #1, to that train, and couple on?

A. Past the thoroughfare; yes, sir.

Q. That was a distance of eight or ten car lengths?

A. Something of that order; I couldn't say exactly. 307

Q. Then you would proceed on, I suppose?

A. Yes, sir.

Q. You did not know at that time what you were going to do?

A. I heard the remark made that you objected to before.

Q. You had not seen any orders?

A. No, but I heard that remark.

Q. You had not received any orders? 308

A. No, sir.

Q. All that you were interested in, at the time the accident occurred, was to run this engine and car over there and couple onto the cars standing there?

A. Yes, sir, and be ready to go.

Q. That was about 4:00 o'clock in the morning?

309 A. Somewhere along there; I don't remember the correct time.

Q. There was nothing else around there, that you saw, moving about that train?

A. I cannot recall.

RE-DIRECT EXAMINATION by Mr. Sullivan:

310 Q. What was your object in getting on the car at that time?

A. When I attempted to board it?

Q. Yes, sir?

A. You are instructed to ride the rear end of a train when backing up at night, over a public thoroughfare; that is to protect public thoroughfares—

311 Mr. Adams:

Q. Is that a written rule?

A. That is a written rule.

Mr. Adams: I submit the rule is the best evidence.

Mr. Sullivan:

Q. It was in compliance with that rule that you
312 wanted to get on the end of this car?

Mr. Adams: Put the rule in evidence, first.

Q. Do you know what the number of it is, Mike?

A. No, sir.

Mr. Adams: Rule 102-A.

Q. "When cars are pushed by an engine,

a trainman must be in a conspicuous position on 313
the front of the leading cars."

Mr. Adams: Read 102-A.

A. "When a train is shifting over a crossing, where there is no watchman, a brakeman must be stationed on the crossing to give warning to persons using the same."

RE-CROSS EXAMINATION by Mr. Adams: 314

Q. You were familiar with that 102-A at that time, were you?

A. I cannot say I was.

Q. You don't see anything there about riding over a crossing, do you?

A. It says you must be there.

Q. Nobody said anything to you that night about guarding that crossing? No member of your crew? 315

A. No.

Q. You were familiar with all these rules, were you not?

A. No, sir.

Q. But you had a copy of the book?

A. Yes, sir.

Q. Will you read the copy of General Rule "O" there? 316

A. "Employees must examine, and know for themselves, that the grab-irons, brake-shafts and attachments, running boards, steps and all other parts of cars and engines which they are to use, and all mechanical appliances, tools, supplies and facilities of every kind, of which they must make use in performing their duties, are in proper con-

317 dition; if not, they must put them so, or report them to the proper person and have them put in order before using."

Mr. Adams: That is all.

Mr. Sullivan: That is all.

Mr. Adams: I move to strike out the testimony of the witness, to the effect that the rules provide that he should ride the car
318 across the crossing; they seem to provide to the contrary.

The Court: You may strike that out. If you should find any rule later on, that shows clearly what the rule is, you may offer it, but, for the present, the motion to strike out is granted.

319

DANIEL J. DELAHANT, being duly sworn as a witness for plaintiff, testified as follows:

Direct Examination by Mr. Sullivan:

Q. Where do you live?

A. #74 Lewis street, Buffalo.

320 Q. How old are you?

A. 25.

Q. Were you at one time in the employ of the Pennsylvania Railroad Company?

A. Yes, sir.

Q. How many years were you in the employ of the Pennsylvania Railroad Company?

A. About 3½ years; I don't know exactly.

Q. In what capacity? 321

A. Freight brakeman.

Q. On what division or line?

A. Buffalo division.

Q. And the Buffalo division extends from where to where?

A. At that time it was from Buffalo to Emporium, and from Hinsdale and Rochester to Buffalo and Oil City. There was a couple of little 322 branches also included in that division.

Q. It was in that territory that you worked?

A. Yes, sir.

Q. In what capacity did you work?

A. Freight brakeman, and I was promoted to freight flagman.

Q. What part of the time were you freight brakeman?

A. I should say the most of the time. 323

Q. What are the differences between the duties of freight brakeman and freight flagman?

A. The duties of a flagman are to protect the rear end of the train, when the train comes to a standstill, and when there is danger of being approached by a following train.

Q. He doesn't do much of the switch throwing and shifting of cars, or anything of that sort? 324

A. He doesn't do much shifting, but as far as switch throwing is concerned, when you pull in a side track and pull out again, it is up to him to close the switch.

Q. He must adjust the switch back of the train after they have passed?

A. Yes, sir.

325 Q. Were you a member of the crew the night that Mike Boehmer got his injury at Brocton?

A. Yes, sir.

Q. Describe, in your own way, what happened at Brocton—what you saw and did?

A. Well, for the time, I remember we had a light train known as "Stock" (?) We set off a few cars at Corry, and we received a message at
326 "Kr." which said, "Pick up all grapes at Brocton"; that was the exact contents—I saw the message myself—I climbed on the engine and read the message. We pulled into the passing siding at Brocton. I do not remember getting coal and water, but that was the customary thing there, and I suppose we did. After we got it—when we came to the road crossing, and stopped clear of the road crossing, we cut the engine off, and pulled
327 to the tower, to find out where the grapes were—the conductor went in the office to find out where they were, and he came out and said there was only one car over on the Nickel Plate transfer; he gave me the number of the car, and told myself and Boehmer to go up and get the car; we pulled up over the switch, and back in through #3; backed over the crossover leading to the
328 Nickel Plate track, and crossed over into the Nickel Plate, into what is called the Nickel Plate transfer track. I found the car was about four or five cars deep in there. Before we went in there, I explained to Boehmer that he should stay at the switch, and I would go in and find the car, because he wasn't acquainted about the yard. I went in and got hold of the car, and pulled four

or five cars on the main track, and kicked the one 329
down the Nickel Plate main track, and backed up to make the shift in the Nickel Plate transfer; I told Boehmer, after we got in there, to line the switch back again for the Nickel Plate, and that I would "stake" the car out of the Nickel Plate main track.

Q. Will you explain to the jury about "staking" the car?

330

A. I shoved in there and got the cars ahead of the engine cut off, then took the stake off the engine, and saw that Mike had thrown the switch back again, and put the stake across to the car and pushed it out; I told Mike, when the car came by him, to catch it, so that it would not go too far. He caught it and stopped it. I picked up the stake and put it on the engine.

331

The Court:

Q. What do you mean by "stake"?

A. It is a pole they use for poling cars by the engine; if you have a car ahead of the engine—

Mr. Sullivan:

Q. When your engine first approached this car, it was up here on the Nickel Plate transfer, four or five cars deep, on that track (shows)?

332

A. Yes, sir, on that track there.

Q. On that siding?

A. Yes, sir.

Q. So that, in order to get that car out of there, and get it behind your engine, so that you could couple it on, you had to first pull the string, with that car on the end of it, down here to this point, and send that car back onto the west-bound main track of the Nickel Plate?

333 A. Yes, sir.

Q. When your engine had shifted it back, how did you disconnect it—did you disconnect it?

A. I disconnected the car.

Q. After you disconnected the car there was nobody on it?

A. Nobody on the car.

Q. It was running west on the main Nickel
334 Plate?

A. Yes, sir.

Q. Who stopped it?

A. Well, I didn't get on the car at all to make the cut; I ran along the ground and cut the car off; I didn't give it much of a kick. After I cut it off, it seemed to be going too far—I didn't want it to go too far, and I chased after the car.

Q. On which end were you?
335

A. On the east side.

Q. That would be on the engineer's side of your engine?

A. Yes, sir, on the engineer's side of the engine. I chased the car and attempted to get on it—on what they call the southeast corner; I reached up to get hold, and I couldn't get hold of nothing, and I ran ahead to the other side, and
336 climbed on the step, but I didn't get on top of the car, because at that time the car had slowed up and stopped, and it wasn't necessary to set the brake.

Q. You attempted to put your hands against the side of the car where the grab-iron should be, —on the southeast corner?

A. Yes, sir.

Q. On which corner of the car had you at- 337
tempted to board it first?

A. Southeast corner we call it.

Q. What did you do in attempting to board it?

A. I was behind the car, chasing it, and I reached my hand up to get hold of the grab handle.

Q. Where?

A. On the southeast corner—on the side of the 338
car.

Q. You had overtaken it?

A. I had overtaken it.

Q. After the car stopped, did you go back to the rest of the cars?

A. No, sir; I had already given them the signal to back up.

Q. You had given your engineer the signal, 339
after you pulled the car—

A. After I caught the car.

Q. After you pulled the coupling pin and had caught the car, you signalled him to stop and back up?

A. Yes, sir.

Q. What did he do?

A. He backed up over the switch.

Q. To the south? 340

A. To the south, over the switch point leading into the Nickel Plate transfer. I guess Mike must have swung him down and swung him in there.

Q. Mike adjusted the switch so that he could go back in there?

A. Yes, sir; Mike adjusted the switch and he shoved in there; he shoved up far enough so that

341 the engine was north of the car on the main track.

Q. It was north of the grape car that you cut out, and was on the west-bound main track of the Nickel Plate?

A. Yes, sir.

Q. Was it from that point that you "staked" it?

A. Yes, sir.

342 Q. Tell us what the "staking" proposition is?

A. In this case the car was ahead of the engine, and it was necessary to get the car behind the engine to take it with us, and in order to get the car behind like that you must either make a "drop" or "stake" it by; if it is handy, we stake it by; the engine will be on one track, and the car on the adjoining track, so that the stake will rest in a position like that, (shows) if the width be-
343 tween the tracks isn't too much; the stake is about that way—the engine here and the car there, (shows) and you put the stake over there, and the engine gives the car a good "bat" so that the car will run over the switch, and the engine can back down onto the car.

Q. After the car runs over the switch, then somebody has to stop it,—or must where it is the
344 end car?

A. You don't always necessarily have to stop it—

Q. In this case, who stopped it?

A. Mike Boehmer stopped it.

Q. Then the switch was adjusted, and the engine followed along?

A. Yes, sir.

Q. Did you couple it up, or do you know who coupled it—then you and Mike coupled the car? 345

A. Yes, sir.

Q. Then the engine went back on #3 track, down to the north of this yard?

A. Yes, sir.

Q. Where did you go?

A. I went back to the cabin.

Q. You were not down to the north end when Mike was hurt? 346

A. No, sir.

Q. Did you go down there afterwards?

A. Yes, sir.

Q. And he was by this car?

A. Yes, sir.

Q. During the time you had been in the service of the Pennsylvania Railroad as brakeman, had you observed a great number of cars? 347

A. Not very many; it was very seldom—

Q. You had seen a great many cars?

A. Yes, sir.

Q. As they passed you?

A. I have seen them; yes, sir.

Q. Do railroad men—you don't make a close inspection of railroad cars that are passing?

A. I never noticed them making inspections. 348

CROSS EXAMINATION by Mr. Adams:

Q. How long since you worked for the Pennsylvania?

A. It was along about the middle of February, I think.

Q. Were you discharged?

349 A. I was not.

Q. Where did you go from the Pennsylvania?

A. I didn't do anything for a couple of weeks; from there I went ship building.

Q. How long did you work for the Pennsylvania?

A. Just a trifle over 3½ years.

Q. Where did you work before you went with
350 the Pennsylvania?

A. American Car & Foundry Company.

Mr. Adams: That is all.

DR. WILLIAM H. MARCY, being duly sworn as a witness for plaintiff, testified as follows:

351 Direct Examination by Mr. Sullivan:

Q. You are a physician and surgeon?

A. Yes, sir.

Q. You are surgeon for the Fire Department of the City of Buffalo?

A. Yes, sir.

Q. Are you connected with—

352 Mr. Adams: I will concede the doctor's qualifications; there is no question about it.

Q. Have you ever examined the plaintiff, Mike Boehmer?

A. Yes, sir; I saw him at his residence months ago; I do not remember when—a year ago, I guess, and I just saw him today.

Dr. W. H. Marcy, for Pltf., Direct.

Q. Tell the jury what you found when you first examined him, and also what you found today. 353

A. I found that he had a leg amputated at—what I would call the lower third—above the ankle—about an eleven or twelve inch stump, from the kneepan down. At that time it had not healed. I think that was three or four months after the injury. I saw it again today, and the stump—he has now an eleven inch stamp from the kneepan down. He has a chronic induration at the end of the stump,— that is a chronic inflammatory condition, and there are two ulcers at the end of the stump, one about one-half inch wide and one inch long, right over the shin bone, and the other is right over where the top of the smaller bone of the leg, called the fibula, is cut off; the shin bone is the tibia. I do not know why it doesn't heal; there is a cehronic inflammatory condition there, there is t chronic inflammatory condition there, and the flaps look unhealthy, and the leg must either be scraped, and keep on trying to healt it—I think the quickest and safest way would be to amputate the leg about one or two inches up the stump, and get new, healthy tissue; that would leave long enough stump for a good leverage for an artificial leg. 354 355 356

Q. At the time of the first examination was there any indication of a septic condition?

A. I would not say septic.

Q. What do you call gangrene? He said gangrene set in, or something.

A. After amputation, sometimes—

Q. Before amputation; they tried to save the

357 foot, and I think it was two or three weeks at least after the injury that the first amputation was made, and he said that in the mean time gangrene set in.

A. He had no gangrene at the time I saw him.

Q. If he had had gangrene in there, would that have anything to do with the present condition of the tissue

358 A. When you say "gangrene,"—of course, I appreciate that oftentimes when a leg is crushed, and we amputate it, sometimes the tissues brought over the bone have been crushed sufficiently so that it sluffs, and that produces a local gangrene, but not what we call a general gangrene; if that had taken place, there would be more or less scar tissue formed when healing, which would leave the stump unhealthy and hard to heal.

359 Q. I understood that the particular injury at the time of the accident,—I learned today—I supposed it was crushed higher up—that the direct injury at the time of the accident, was largely to the arch of his foot.

A. Yes, sir. No bruising of the skin above the ankle?

Q. Probably some bruising.

360 Mr. Adams: I think the doctor should confine himself to what he saw.

Q. Assuming the leg became inflamed—

Mr. Adams: I object to his assuming something not proven.

The Court: Start all over again.

Q. Assuming the direct injury was the crushing of the foot across the ball of the foot, or the

arch of it; that he was taken to the hospital, and 361
an attempt made to save the foot, and in the course of two or three weeks inflammation, which he describes as gangrene—that may not be it exactly —say an inflammation set in, which caused a swelling that reached above the knee, and a sore, inflamed condition—

A. That was before the amputation?

Q. Before the first amputation, and then the 362
amputation took place somewhat lower down than the present condition, and that it still continued inflamed and sore until a few months after the accident, when another amputation of probably an inch took place, and it still continued inflamed and sore for a long time, can you say, with a reasonable degree of certainty, whether or not that condition which has been described to you would 363
have any relation to the present condition you find?

A. In a way; he had infection, which necessitated the first amputation, and there was more or less involvement of those tissues, then the second amputation took place, and the tissues were in an unhealthy condition, and have been in an unhealthy condition down to the present time, 364
and failed to heal.

Q. You have examined the man and observed him as to his general health?

A. Yes, sir.

Q. What do you find?

A. As far as I can find, his general health is good.

Q. Can you say with a reasonable degree of

365 certainty, whether or not his present condition is due to this injury?

A. Yes, sir.

Q. Would you say it is?

A. It is.

Q. As to the future—you observe that he is wearing this artificial leg?

A. Yes, sir.

366 Q. What would be your idea about his ability to wear that leg in his present condition?

A. He cannot wear it at the present time; he is putting a good weight on it; he has two ulcers there, and the tissues are very unhealthy, and he is only increasing the irritation and unhealthy condition by using pressure at the point where the amputation took place.

367 Q. Your opinion then is that another and further amputation would be the best thing for this man?

A. It would save time, and get a better result in the end.

Mr Sullivan: That is all.

CROSS EXAMINATION by Mr. Adams:

Q. That is not an unusual condition, where a 368 man has lost his leg, is it?

A Yes, sir, it is; a year and a half—sixteen months is pretty long to heal up; I should say it was unusual.

Q. It is better than it was the first time you saw it?

A. No, it is not; when I saw it the first time I thought it would heal up in three or four weeks.

Q. Doesn't it frequently happen, where a man 369
has a limb off, in that shape, and uses an artificial limb, it results as this has—first irritates it, and inflammation sets in?

Q. They sometimes irritate and crack open, and have a soreness.

Q. It must be a process of healing?

A. It must be a process of healing at first; it is like wearing a new shoe; it is liable to pinch 370
and blister. He has something more than that—he has a deep ulcer, that looks very unhealthy.

Q. That is amendable to treatment?

A. It is over a long course of treatment to heal it up; the amputation is getting rid of it quicker, and I think that is the best way; I think if it is amputated at healthy flesh, he will have a good wearing stump, and not break out again.

Q. After the ulcer heals up, he will have it 371
without it?

A. When the ulcer heals up he will have a fairly good bearing stump.

Q. You think you could fix it up a little better than it is now, by cutting it off again?

A. According to his history, it has been nearly 16 months open; there is something wrong there, and I would not go on for 16 months more treating it; if you amputate it, in six weeks you will 372
have a healthy end there.

Q. Can you tell, as a matter of fact, what caused the ulcer—whether the use of the leg, or what it is?

A. It is not that; it has been there, more or less, since the first amputation.

373 Q. You know he has been using that artificial leg—

A. He said he had been using it, but it was open before he started using it,—so he said.

Q. You expect to get a good stump finally?

A. Yes, sir, because he has plenty of tissue above that to get a good stump; if you can't get it one way, you can another.

374 Q. There is a question involved in most every case of amputated limb—you sometimes get one result, and sometimes another?

A. Varied results.

Q. Frequently you must shave it off in order to get a satisfactory stump?

A. Sometimes we leave the bone too long, and must do it.

375 RE-DIRECT EXAMINATION by Mr. Sullivan:

Q. Could you show to the court and jury, if the man was here—could you show them what would have to be done, better than you have described it, if I put him before the jury?

A. Perhaps they might understand it better; I don't know; they could see the ulcer, and what I
376 have described the best I could.

Q. In amputating a leg, where you are going to have a stump that the weight is to be carried on, one of the essential things to be desired is to have a good cushion over the end of the bone?

A. To have sufficient cushion, and healthy flesh.

Q. Without sufficient cushion and healthy tissue, what results?

A. Without healthy tissue, it breaks out, and 377
without sufficient cushion there is too much contraction, and it is liable to break out and blister—you want sufficient, but not too much; if you have a lot of flesh that you must take up, it folds up and cracks, and produces a chafing, and you get blisters.

Q. What have you observed about the condition of the cushion on his leg here?

A. The cushion is all right, only the cushion 378
over the end of the stump is unhealthy, and there are ulcers in the cushion, so that he cannot put a bearing on it.

Q. Do you mean sores?

A. Yes, sir; I mean sores eaten in there; he has a place eaten in over the shin bone about one-half inch wide and an inch long, and it is discharging a watery serous fluid, and the end of it is 379
blood red.

Q. What about the blood circulation at that spot?

A. It is not so good; in fact, it shows stagnation from its color.

Q. And attempting to use it to get in shape and to get around is really an irritation?

A. It would really heal up quicker if he was off 380
of it and elevated it.

Q. Cut it off, and elevate it?

A. Cut it off, or elevate it without cutting it off—take the artificial leg off, and elevate it.

Mr. Sullivan: That is all.

Mr. Sullivan: I offer in evidence a document, inscribed on the title page, "Before the Interstate Commerce Commission;

Offering of Order of Interstate Commerce Commission.

381

United States Safety Appliance Standards; March 13th, 1911; Order of the Commission," and I offer the paragraph under the title of "Sill steps," on the bottom of page 4, and top of page 5.

I also offer the paragraph relating to "Side handholds," on pages 6 and 7 of
382 this document; also, the introductory portion of the order, on pages 1 and 2.

Mr. Adams: I object to any part of this order; I have not had a chance to examine it in detail; I object to a part of the order, and I object further to the offering of any order made by the Interstate Commerce Commission on this date, that does not include the time in which said work shall be
383 done; there was another order entered on the same date, that fixed the time in which the work should be done, and we are entitled to have them all.

The Court: Yes.

Mr. Adams: We are entitled to all the orders entered at that time, on this subject; they were all entered together, on
384 the same date; they are practically the same order, and I object to one of them without the other. I do not object to the method of proving them.

The Court: I suppose, if he offers it, he may offer any parts he wishes, and if there are any parts that you wish to put in, you may do so.

Mr. Sullivan: Certainly.

Mr. Adams: I never heard of introducing a part of a statute and not the whole. 385

The Court: I understand this is not a part of a statute; there would not be a piece of a statute admissible, without the whole statute. I assume there may have been a lot of irrelevant matters, that there is no necessity of burdening the record with.

386

Mr. Adams: If that is so, we could agree on that later—as to any part that does not bear on this subject.

The Court: He is offering what he considers to be the necessary and essential part bearing on his case.

(Document submitted to court).

The Court: While I have not read all of this, I note the fact that there is a paragraph concerning "Sill steps" and "Side handholds," I will receive it as offered. 387

Mr. Adams: Exception.

The Court: Exception noted.

Document received, as offered, and marked Plaintiff's Exhibit #4.

388

DANIEL J. DELAHANT, re-called:

Further Cross Examination by Mr. Adams:

Q. Is that made out in your handwriting? (Witness shown a paper).

389 A. I wouldn't swear to that; it looks like it.

Q. Do you remember the number of that car that you got on the Nickel Plate; is that it there (shows)?

A. Yes, sir, that is the car.

Q. What is that car?

A. What kind of car?

Q. What is the initial, and number of it?

390 A. T. R. E., #32203.

Q. That is your original record—the original train sheet?

A. Do you mean that I made that out?

Q. Yes?

A. I don't remember.

Q. That is in your handwriting, isn't it?

A. I wouldn't swear to that.

Q. Can't you tell your own figures?

391 A. No, sir; I don't believe that is my handwriting.

The Court:

Q. Can't you tell whether that is your handwriting, or not, Mr. Delahant?

A. Yes, sir; I will say positively that is not my handwriting.

392 Q. You say positively that is not your handwriting?

A. Yes, sir.

Mr. Adams:

Q. Do you recognize that as being a list of the cars on that train?

A. I recognized that car number, but I don't recognize any of the rest of them there.

Q. You recognize that as being the number of the car you got from the Nickel Plate that night?

A. Yes, sir. 393

Q. And on which he was injured?

A. Yes, sir.

Q. That was the last car you picked up on that trip?

A. Yes, sir.

Q. And it appears on this list as the last car?

A. Yes, sir.

Mr. Adams: I ask that the paper be marked for identification. 394

Paper marked Defendant's Exhibit #4, for identification.

RE-DIRECT EXAMINATION by Mr. Sullivan:

Q. What was that paper that counsel showed you?

A. It is a car record,—most generally made out by the flagman. 395

Q. Of what train?

A. It is a record of all cars moved on that trip.

Q. Somebody in connection with the crew is supposed to make a record of that sort?

A. Yes, sir.

Q. Who usually does that? 396

A. The flagman is the one that generally does it.

Q. He is on the caboose?

A. Yes, sir.

Q. Have you sometimes made the records?

A. Yes, sir.

Q. You don't think that is yours?

397 A. I know surely that is not mine.

Q. Why is it that you can pick out that particular car? What was there about it that you can distinguish that car from the others?

A. In case of an accident of that sort, I would naturally remember the car.

Q. Did you go back after this man was hurt, and look at the number of that car?

398 A. Not at Brocton, I didn't.

Q. But you did at some time during that trip —you looked at that car?

A. Yes, sir.

Q. And fixed it in your memory?

A. Yes, sir.

Q. It is by reason of the character of the car, and its number, and being fixed by the accident, you can distinguish it as being one of the cars on
399 that sheet?

A. Yes, sir.

Q. And only through that fact?

A. That is all.

RE-CROSS EXAMINATION by Mr. Adams:

Q. You are sure the car on which he was injured was #32203 T. R. E?

400 A. If that is the car, and the way he says he was injured while backing up, at that car, I am positive that was the car.

Q. That is "Tropical Refrigerator Express"?

A. I think that is it

Mr. Adams: That is all.

Mr. Sullivan: That is all; we rest.

Plaintiff rests.

Mr. Adams: I move for a nonsuit and a 401
dismissal of the complaint, on the ground that the plaintiff has failed to prove the cause of action alleged in the complaint, or any other; that he has failed to prove any negligence on the part of the defendant.

Further, on the ground that he has failed to prove that the accident was not caused 402
solely by his own contributory negligence, and

Further, that the proof affirmatively shows that his injury was caused solely by his own contributory negligence;

Further, on the ground that the plaintiff had assumed the risk of accident such as alleged in the complaint and proven here on the trial, and 403

Further, on the ground that the cause of action alleged in the complaint, being based upon an alleged violation of the Safety Appliance Act, the plaintiff has failed to establish such violation as having occurred.

The Court: The motion is denied.

Mr. Adams: Exception.

404

GEORGE F. LAUGHLIN, being duly sworn as a witness for defendant, testified as follows:

Direct Examination by Mr. Adams:

Q. What is your business, Mr. Laughlin?

A. General superintendent of the Armour Car Lines and Fruit Growers' Express.

405 Q. What is known as the Tropical Refrigerator Express cars?

A. Line of cars confined to the carrying of bananas.

Q. Cars owned by the Armour Company?

A. Yes, sir.

Q. You say you are superintendent of the car shops?

406 A. Yes, sir; the Armour Car Lines and Fruit Growers' Express.

Q. By whom is this car T. R. E. 32203 owned?

A. Armour Car Lines.

Mr. Adams: Will you stipulate that is the car?

Mr. Sullivan: This car #32203, T. R. E.?

Mr. Adams: Will you stipulate that?

Mr. Sullivan: Yes, sir.

407 Q. What are your duties in connection with your position with the companies named?

A. My duties are connected with the construction of cars, designing, rebuilding and repairs. I have charge of the shops of the company.

Q. Are you familiar with the car known as T. R. E., 32203?

A. Yes, sir.

408 Q. You say that is owned by the Fruit Growers' Express?

A. Armour Car Lines.

Q. Can you tell whether or not that car was built prior to July 1st, 1911?

A. Yes, sir; it was built in 1897.

Q. It was built in 1897?

A. Yes, sir.

Q. It was an old car then? 409

A. Yes, sir.

Q. Do you know whether or not, between July 1st, 1911, and November 8th, 1915, that car was shopped for repairs, amounting to practically a rebuilding of the body of the car?

A. We have no records showing it was rebuilt.

Q. Would you have, if it had been?

A. Yes, sir.

Q. Do you keep a record of all work done on 410
all your cars?

A. We do make out records.

Q. That is done under your supervision?

A. Yes, sir.

Q. All work done on your cars at foreign points, do you have to keep a record of that also?

A. What do you mean by foreign points?

Q. If work happened to be done on it while out 411
on the road?

A. We receive a bill from the railroad company for that work.

Q. So that, ultimately, you get under your supervision a record showing everything that has been done with the car?

A. Yes, sir; either a bill from the railroad company, or what is termed a railroad repair 412
card.

Q. Have you examined, at my request, for the purpose of ascertaining those facts—have you examined your records?

A. I have.

Q. You may state what the charges amount to, that you find has been expended on that car for labor.

413 Mr. Sullivan: It appears there was a record; if he has received his information from that source, in reference to the car, I ask that he produce the record.

The Court: Have you got the record?

Mr. Adams: It is the absence of the record that establishes the fact that it has not been rebuilt.

414 Mr. Sullivan: He said there was a record.

The Court: He said, if there was anything, there would be a record. Is that correct?

The Witness: Yes, sir.

Mr. Sullivan:

Q. Didn't you say there was a record kept of
415 every item of work done, either by your company or by a foreign company, in one form or another, that is, a claim against your company as to that car?

A. I said we received records from foreign companies.

Q. That are kept and compiled by your company?

A. We received them and complied them for a
416 certain time.

The Court:

Q. Have you any pertaining to this car T. R. E. 32203?

A. Yes, sir.

Mr. Adams:

Q. That is repair cards?

A. Yes, sir.

Mr. Sullivan: 417

Q. Where are they?

A. Mr. Adams has them.

Mr. Adams:

Q. Have you any record showing the car had been rebuilt?

A. No, sir.

Q. You mean that it had not been rebuilt, or that you have no record? 418

A. I haven't any record of rebuilding it.

Q. Did you see this car shortly after the accident occurred?

A. Yes, sir.

Q. You are familiar with the series of numbers on this car?

A. Yes, sir.

Q. Did you examine it at that time? 419

A. Yes, sir.

Q. Are you able to state, from your examination of that car, whether it was rebuilt prior to—within ten years prior to the time of the accident? Yes, or no.

A. No; I can say it was not rebuilt.

Q. Then you can state? You answer "Yes" to the question? 420

A. I can state.

Q. Was it?

A. No.

Q. You made an examination of it at that time?

A. Yes, sir.

Q. Personally?

A. Yes, sir.

421 Q. You say you have knowledge of the fact that this car was built in 1897?

A. Yes, sir.

Mr. Adams: That is all.

CROSS EXAMINATION by Mr. Sullivan:

Q. How long have you been in your present position?

422 A. In my present position since 1910.

Q. How long have you been with the company?

A. Since 1892.

Q. In connection with the cars?

A. Yes, sir.

Q. Did you see this car built?

A. No, sir.

Q. How do you know it was built in 1897?

A. I am familiar with the entire 200 cars;
423 that was a part of that lot.

Q. How do you know this particular car was built in that year?

A. By its number.

Q. Only by its number?

A. Yes, sir.

Q. You did not see it built?

A. No, sir.

424 Mr. Sullivan: That is all.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. Mr. Laughlin, you say you have been with the company since 1892?

A. Yes, sir; since 1892.

Q. I show you some photographs,—I will show you them all in a bunch, to save time; are those all photographs of this car?

(Witness shown a number of photographs). 425

A. Yes, sir.

Q. Taken under your directions?

A. They were not all taken under my directions; some of them were taken under the directions of the St. Louis superintendent.

Q. Were you present when they were taken?

A. No, sir.

Mr. Adams: I ask to have them all marked for identification. 426

The Court: Mark them all as one exhibit. Package of photographs marked Defendant's Exhibit #5 for identification.

Q. They are all photographs of that car?

A. Yes, sir.

Q. In different positions?

A. Yes, sir. 427

Q. I show you two others; do those also represent that car?

(Witness shown two other photographs).

A. Yes, sir.

Q. They are two smaller photographs?

A. Yes, sir.

Mr. Adams: I will put them in with the others. That is all.

428

RE-CROSS EXAMINATION by Mr. Sullivan:

Q. Mr. Laughlin, I show you a photograph; do you recognize that car?

(Witness shown a photograph).

A. Yes, sir.

Q. Is that one of your cars?

A. That is a Fruit Growers' Express car.

429 Q. That is the same thing, is it not—Tropical Refrigerator car?

A. It is not the same line of cars; no, sir.

Q. When was that built?

A. I don't know.

Q. Why not?

A. I haven't the record of all our equipment in my head.

Q. Can you tell now when it was built?

430 A. No; I don't know.

Q. By seeing that number?

A. No, sir.

Q. You do not know?

A. No, sir.

Q. You observe, however, that that car is equipped on the side shown here, with a ladder and step, at one end, and a handhold and step at

431 the other?

A. Yes, sir.

Mr. Sullivan: I offer it in evidence.

Mr. Adams: I object to any evidence as to any other cars.

The Court: This is some other car?

Mr. Sullivan: Yes, sir.

The Court: Objection sustained.

Mr. Sullivan: Exception.

432 Q. How long do the wheels on a car last? How often are they renewed?

A. Depends on what kind they are; if they are cast iron they will last two and a half to three years; steel wheels, will last considerably longer.

Q. What did this car have when it was built in 1897?

A. Cast iron.

Q. What was on her when you last saw her? 433

A. Cast iron.

Q. Then the wheels were renewed on that car every two and a half years, in the ordinary wear and tear?

A. Approximately.

Q. She had to be sent to the shop for that purpose?

A. Not necessarily; a repair track would do for that work. 434

Q. At the repair track, handholds and sill steps could be put on?

A. Yes, sir, they could.

Q. And they are every day?

A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. State what equipment this car had on, as far as ladders, handholds, and sill steps were concerned? 435

A. It had the equipment that was standard, used by—

Mr. Sullivan: I object to that.

The Court: Strike out the answer.

Q. (Question read by reporter). Describe what it had on—how many ladders, etc?

A. It had ladders at diagonal corners. 436

The Court:

Q. What do you mean by that?

A. Ladders on all the diagonal ends of the car.

Mr. Adams:

A. Diagonal corners, and opposite ends, it had grab irons on the side of the car, on the same end

437 the ladder was located, and had a sill step under grab iron; on the ends of the car it had grab irons the opposite from the ladders, for the protection of anybody going between the cars for uncoupling.

Q. Those are all shown in these photographs?

A. Yes, sir.

Q. Were all the cars of your company—the old

438 ones—equipped that way?

A. All cars built prior to 1911 were.

Q. That is prior to the time the Interstate Commerce Commission ordered the change?

A. Yes, sir.

Q. Of course, the wheels are an entirely separate proposition from the body?

A. Entirely.

Q. I will ask you again, what the largest

439 amount of money expended at any one time, for repairs to the body of this car, was?

Mr. Sullivan: I object to it as incompetent, immaterial and irrelevant; the records are the best evidence.

The Court: I think so.

Mr. Adams: I will get the records.

Q. You have examined all these records, have

440 you?

(Witness shown papers).

A. Yes, sir.

Q. Will you pick out the largest amount here. What was that—do you remember?

A. I think it was $12.85.

Q. Is that the one? $12.25. (Shows).

A. That is it. That is not confined to the body of this car; there was some truck work on that; that is for labor.

Q. That is not all confined to the body? 441

A. No, sir.

Q. That $12.55, then, is the largest amount expended on this car at any one time?

A. Yes, sir.

Q. For labor?

A. Yes, sir.

Q. How much does it cost to rebuild the body of a freight car, such as this?

A. It would cost at least— 442

Mr. Sullivan: I object to it as immaterial.

The Court: Objection sustained. It does not appear what rebuilding is.

Q. Do you know what I mean by rebuilding the body of a car?

A. Yes, sir.

Q. That is the superstructure?

A. Yes, sir. 443

The Court: You are asking about rebuilding the body; what do you mean?

Mr. Adams: Rebuilding the body of the car identical with that—taking off the old body and putting on a new one; how much that would cost.

The Court: All right.

A. At least $550.00.

444

RE-CROSS EXAMINATION by Mr. Sullivan:

Q. Do these sheets contain the times you put wheels on this car?

A. Contains all the records—all the work we did—the sheets and book records.

Q. We find 15 times it has been in the shops; are there any other reports?

445 Q. We find 15 times it has been in the shops;

A. I think it runs about 19 times: they are all numbered.

Q. In 1911; May, 1912; May, 1912; July, 1912; July, 1912; October, 1913; September, 1913; July 1914—it was in as those cars are,—right straight along?

A. Those are some of the dates.

446

Mr. Adams:

Q. You say the record you referred to—that $12.55 is the largest one?

A. Yes, sir, that is the largest.

Mr. Adams: I ask that it be marked for identification.

Repair sheet marked Defendant's Exhibit #6, for identification.

447

Mr. Sullivan:

Q. You do not mean to say the wheels would not cost more than that?

A. That is the labor there.

Q. It would cost more to put a set of wheels under it, wouldn't it?

A. The net charge for a set of wheels would
448 run about $7.50.

Q. To put a set of wheels under it?

A. Yes, sir.

The Court:

Q. What wheels?

A. A pair—two wheels.

Q. There are eight on both trucks?

A. Yes, sir; it would be four times that, if you changed them all. 449

RE-DIRECT EXAMINATION by Mr. Adams:

Q. These 15 cards here include some that amount to a few cents?

A. Yes, sir.

Q. Wherever they put on a piece of board or roofing, you have a record of it? 450

A. Yes, sir; the amount we pay for the actual work they do.

Q. Some are as low as two or three cents?

A. Yes, sir.

Mr. Adams: I will put these in the bunch with the other exhibit.

The Court:

Q. Is it necessary to rebuild a car,—as the question has been put,—in order to equip it with grab irons, ladders, etc.? 451

A. No, sir.

Q. When you said to be "rebuilt" you meant duplicated, did you not? I am not quite satisfied with the word "rebuilt."

Mr. Adams: I am using the language of the statute; the law does not require us to put on grab irons—we are not responsible for the Armour Company anyway—but the law does not require us to put on grab irons when a car goes into the shop; it says "Repairs amounting practically to a rebuilding of the body of the car"; that was the reason I used that term "rebuilding". 452

453 Mr. Adams:

Q. Putting on wheels, or substituting wheels does not amount to changing the body of the car?

A. No, sir.

Q. On these cards in evidence here—marked for identification—I notice different numbers—where some of them have car number 31915; have you any record of the change in the number
454 of that car?

A. I have.

Q. When was that done?

A. My recollection is it was in October, 1914.

Q. You have a record of it?

A. Yes, sir.

(Witness produces paper).

Q. Is that the original record, made at the time that number was changed?
455

A. Yes, sir.

Q. That is one of the regular repair slips?

A. Yes, sir.

Mr. Sullivan:

Q. What was the occasion for changing the number?

A. It was taken out of one line of cars and put
456 in another—or one allotment.

Q. Was the number painted on the car—was the car repainted and fixed up at that time?

A. No, sir; the numbers were changed; the car was not repainted.

Mr. Adams:

Q. What was the date that number was changed?

A. October 23rd, 1915. 457

Q. Then it was changed from 31915 to 32203?

A. Yes, sir.

Mr. Adams: I ask that the two slips be marked for identification.

Papers marked Defendant's Exhibits #7 and #8, for identification.

Mr. Sullivan: I ask to have this photograph marked for identification—it is the same photograph I previously offered in evidence. 458

Photograph marked Plaintiff's Exhibit #7, for identification.

Mr. Adams:

Q. This photograph shows a new car of the same sort here?

A. It shows a car of fairly good age. (Shows). 459

Mr. Sullivan:

Q. And built before 1911?

A. Yes, sir, built before 1911.

Q. It shows no evidence on it of the car having been rebuilt?

A. That would depend—it does to me.

Q. It shows what?

A. It shows to me evidence of rebuilding. 460

Q. But it shows this grab iron and this step have been placed on there at some time after the car was built; the attachment of them is of such character—

A. I couldn't say.

Mr. Adams: You are referring to that photograph for identification?

461 Mr. Sullivan: This is the same photograph I offered in evidence; it is now marked for identification.

Mr. Adams: I do not object, if you will have the photograph marked, so that the record will show what he is talking about.

Proceedings March 28th, 1917.

Mr. Adams: If the court please, I offer
462 the balance of the order, Plaintiff's Exhibit #4, parts of which were offered by the plaintiff. I have to do that on account of the form which the subsequent order takes.

The Court: Received; it may be marked.

Mr. Adams: Is it necessary to mark it again? It is already in.

The Court: I understood only certain
463 pages or paragraphs were marked; you introduce the balance?

Mr. Adams: Yes, sir; I introduce that order, that was identified.

The Court: It is received.

Mr. Adams: Now, I offer another order of the Interstate Commerce Commission, dated March 13th, 1911. I offer it in toto.

464 The Court: This is the extension order?

Mr. Adams: Yes, sir.

(Document submitted to the court.)

Document received in evidence, and marked Defendant's Exhibit #9.

Mr. Adams: I offer in evidence also an order of the Commission, dated November 2nd, 1915, which extends the time a year

further; it is not really necessary in this 465
case, but it is simply an extension of the order just offered.

Document received in evidence, and marked Defendant's Exhibit #10.

CORNELIUS J. KEATING, being duly sworn 466
as a witness for defendant, testified as follows:

Direct Examination by Mr. Adams:

Q. Mr. Keating, to get right down to the subject here—you are employed by the Nickel Plate Railroad as a conductor, are you not?

A. Yes, sir.

Q. That is the New York, Chicago & St. Louis 467
Railroad?

A. Yes, sir.

Q. And you were in November, 1915?

A. Yes, sir.

Q. You were running between what points on November 6th?

A. November 6th? I was between Conneaut and Buffalo. 468

Q. What time did you leave Conneaut?

A. 8:30, and arrived at Buffalo at 10:10 a. m.

Q. On a freight train?

A. Yes, sir.

Q. Have you your original record there, in your own handwriting?

A. Yes, sir.

(Witness produces paper.)

469 Q. Will you examine that, please, and see whether you find car T. R. E. #32203 there in that list?

A. Yes, sir, I have it here.

Q. That car was in your train that day?

A. Yes, sir.

Q. Where did you get it?

A. I got that car at Northeast, Pa., and took
470 it to Brocton, N. Y., and delivered it to the Pennsylvania R. R.

Q. That is you set it off at Brocton?

A. Yes, sir.

Q. For delivery to the Pennsylvania?

A. Yes, sir.

Q. Can you tell what time it left there?

A. I don't have anything to do with that. The agent keeps that—I leave him the list and he
471 keeps it.

Mr. Adams: Do you care about having the record in evidence, Mr. Sullivan?

Mr. Sullivan: No, sir.

Q. This record shows that you left Conneaut at what time?

A. Left Conneaut, Ohio, at 8:30 p. m.

Q. So that you got to Brocton some time in the
472 morning of the 7th?

A. Yes, sir. I was outlawed at Brocton; I think we are due there, on that schedule, about 7:30 at night, or 4:30 in the afternoon, and I outlawed there—after 12 hours, and laid there until the next morning.

Q. So that you left that car there sometime in the early evening of the 7th?

A. It would be about that time, or a little after? 473

Q. You may state, Mr. Keating, whether or not on the Nickel Plate Railroad, at that time, you frequently used in the service, and drew in your trains—whether or not you handled cars equipped with two ladders, one on each side of the diagonal corners, on the right side, and one sill step and one grab iron on the side, close to the ladder? 474

Q. You may answer?

A. Yes, sir, we have.

Q. Was that a frequent occurrence, to find those cars?

A. Yes, sir, it is—it was at that time, and it is yet; we handle cars that haven't got the grab irons and stirrup steps on the four corners.

Mr. Adams: That is all. 475

CROSS EXAMINATION by Mr. Sullivan:

Q. Name one car, outside of this one, that you handled, that was not equipped with steps and grab irons on all sides?

A. I cannot give you the name, number and initial of them; that has nothing to do with us; we handle them though. 476

Q. All the Nickel Plate cars are equipped with handles and steps on all four corners?

A. Not all of them; all the new ones are that are coming.

Q. You mean to say the railroads are still using cars without handles?

A. There are some old ones; you can probably find them around the yards.

477 Q. You can probably find them around the yards?

A. Yes, sir.

Q. Probably one in every 400 cars?

A. I couldn't say as to that; I have noticed them.

Q. Will you say there was more than one in every 400?

478 A. I wouldn't say there was or wasn't.

Q. Would you say, in 1914, there was one in every 400 cars in service, that you saw, that was not equipped on all four corners?

Mr. Adams: He has stated he cannot tell whether it was 400, or not; it is unfair.

A. I cannot tell you; we don't have any record of them; never kept any record of them.

479 Q. You wouldn't meet one in a week, or handle one a week? Will you state to this jury that you handled more than one a week?

A. I cannot state to the jury that I handled more or less than that.

Mr. Adams:

Q. You remember seeing them frequently?

A. Yes, sir; you may see them often in trains.

480 Mr. Sullivan:

Q. You saw them?

A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. You never refused cars equipped that way?

A. That wouldn't have anything to do with me; if I got a message to pick up a car, I would have to take it.

Q. That don't answer the question. You never refused them? 481

A. No, sir, I never refused them.

RE-CROSS EXAMINATION by Mr. Sullivan:

Q. It is the duty of those at the yard to make an inspection, and refuse cars?

A. Yes, sir.

Q. When they are delivered from one railroad to the other? 482

A. Yes, sir. If they are delivered to me they are supposed to be all right.

Q. The Nickel Plate had an inspector and car men at Brocton at that time?—I mean the Pennsylvania?

A. I don't know anything about the Pennsylvania; the Nickel Plate had, and they have had at Northeast, where I got that car. 483

Q. The regular train crews there don't inspect the cars for handholds and steps?

A. No, sir.

Q. That has to be done by the men—

A. By the inspectors.

Q. At the yards?

A. Yes, sir.

Q. At transfer points? 484

A. Yes, sir.

Q. And it is the practice of the railroads to have men for that purpose?

A. Yes, sir.

Q. At transfer points, where one railroad delivers cars to another?

A. Yes, sir.

Mr. Sullivan: That is all.

485 GEORGE F. LAUGHLIN, re-called for defendant:

Direct Examination by Mr. Adams:

Q. You stated yesterday that you had personal knowledge of the time this car was built; have you some record from your office, which shows
486 that the car was in existence prior to 1910?

A. I have what we call a trip card of this car.

Q. Will you produce it please?

(Witness produces paper).

Q. That is an original record out of your office?

A. Yes, sir.

Q. That refers to what?

A. Refers to the movements of the car, and it
487 is a compilation of the agents' reports, of the various railroads over which it passed.

Q. That is for the month of December, 1909?

A. Yes, sir, that is for the month of December, 1909.

Q. At that time this car bore #31915?

A. Yes, sir.

Mr. Adams: I offer it in evidence.

488 Mr. Sullivan: For what purpose?

Mr. Adams: Simply to corroborate his statement that this car was built prior to 1910; it is offered only for the purpose of showing the car was in existence prior to 1910.

Paper received in evidence, without objection, and marked Defendant's Exhibit #11.

Q. Will you state again Mr. Laughlin, just the 489
date the number of that car was changed?

A. October 23rd, 1915; that is the date on here.

Q. It was changed from #31915 to #32203?

A. Yes, sir.

Q. Do you know why that change was made?

A. Because the allotment was reduced,—the allotment it was in as #31915, was reduced. 490

Q. Referring to a particular kind of service?

A. Referring to a particular kind of cars.

Q. Are you familiar with the safety equipment on cars, generally, on all railroads?

A. Yes, sir.

Q. By that I refer to ladders, grab irons, and sill steps, or stirrups?

A. Yes, sir.

Q. How familiar are you? What is there in the 491
line of your duty that requires you to know about it?

A. It is absolutely necessary to know, in constructing and repairing cars, that they complied with the railroad requirements that existed at the time prior to the Interstate Commerce Commission Law.

Q. You may state, if you know, what the prac- 492
tice was, and the custom, on railroads with which you are familiar, in reference to the equipment of cars built prior to July 1st, 1911?

Mr. Sullivan: I object to that.

The Court: Objection sustained. I will hear you on that, Mr. Adams, if you desire.

493 Argument by counsel.

Mr. Adams: Exception.

Mr. Adams: I ask that the question be read.

(Last question read by reporter).

Mr. Adams: I will add to that, "and not rebuilt subsequently to that time."

The Court: Put the second question, or
494 do you prefer to add it to the question?

Mr. Adams: Yes, sir.

(Question read, as amended: "You may state, if you know, what the practice was, and the custom, on railroads with which you are familiar, in reference to the equipment of cars built prior to July 1st, 1911, and not rebuilt subsequently to that time")?

495 Mr. Adams: I will ask one or two questions more.

Q. Do you know whether or not there was a uniform method adopted by all the railroads, in reference to sill steps and grab irons on the sides and ends of cars?

A. Yes, sir.

Q. You say there was such custom?

496 A. Yes, sir.

Q. Will you state what it was?

Mr. Sullivan: That is the question I objected to.

Q. Tell us what the custom was on all the railroads with which you are familiar, in respect to the equipment of cars with grab irons and sill steps; you may state what the practice, custom or standard was?

Mr. Sullivan: That is the question I ob- 497
jected to.

The Court: He has put it again; do you still object?

Mr. Sullivan: Yes, sir; it is incompetent, immaterial, irrelevant and not proper, because a violation of this statute imposes an absolute liability on the railroad, and any practice they may have adopted is immate- 498
rial; and it will necessitate my bringing other railroad men here to show they did put them on—

The Court: I will sustain the objection.

Mr. Adams: Exception.

The Court: Exception noted.

Q. You have stated already that this car 32203 T. R. E. was not rebuilt between July 1st, 1911, and the present time? 499

A. Yes, sir, I stated it was not.

Q. Is that the fact?

A. Yes, sir.

CROSS EXAMINATION by Mr. Sullivan:

Q. Mr. Laughlin, you have produced in court several sheets—

Mr. Adams: Are you going to offer them 500
in evidence?

Mr. Sullivan: No, sir.

Mr. Adams: I object to your using them then; I do not object, if you offer them.

Mr. Sullivan: I do not want to lumber up the record; I want to refer to them.

Q. You have produced 14—as I count them

G. F. Laughlin, re-called for Deft., Cross.

501 —slips, which you say are records of certain repairs that have been made on this car?

A. Yes, sir.

Q. Those repairs range from 1912, at least, down through to November 10th, 1914?

A. Yes, sir, approximately, assuming that you read the dates correctly.

Q. I have.

502 A. All right.

Q. This record does not contain the records where new wheels were put on?

A. Those contain any repairs that were made to the car.

Q. Will you find any place, in any of them, where it shows new wheels?

The Court: If counsel wants it, he may have it.

503 A. Here is a card that shows a pair of wheels changed.

Q. What date was that?

A. September 17th, 1913 (shows).

Q. The replacing of wheels would be a regular repair to the car?

A. Yes, sir.

Q. All the other items there are regular re-
504 pairs to the car—the items of work done on this car were regular repairs on it?

A. They were repairs to parts that wore out in regular service and required renewal.

Q. That is what you call regular repair, as distinguished from rebuilding?

A. Practically; yes, sir.

RE-DIRECT EXAMINATION by Mr. Adams: 505

Q. Mr. Laughlin, Mr. Sullivan asked you about these cards, of which he says there are 14; you may state whether or not all the repairs indicated here are minor repairs?

A. They are what we term minor repairs.

Q. Will you take these slips and tell us each occasion, giving the date and amount expended, as shown on these slips, on the body of the car? 506

A. I explained that these slips were for labor—

Q. I understand that.

A. The material is not included in them.

The Court:

Q. Does it show what the labor was for?

A. Shows various items of work, in detail.

Q. Just the labor?

A. Yes, sir; it is separated into carpenter 507 work on the body of the car, truck work on the trucks of the car, or the running parts, and the items of repairs are enumerated.

Mr. Adams:

Q. Give us the amounts expended for labor?

A. Separately, or what?

Q. On the body of the car—we are not interest- 508 ed in the trucks; as near as you can, separate them.

A. September 19th, 1913, 48 cents.

Mr. Sullivan: I do not know that the amount expended has anything to do with it; the character of repairs may be material, but the amount expended may not be material

509 The Court: That was what I was trying to get at; that was what was in my mind. Can the witness state what that 48 cents was for?

Mr. Adams: I do not care about this; he has already testified that the largest amount expended was $8.00 and something, and that is all I care about showing.

510 Q. You say it would cost about $550.00 to rebuild the body of the car?

A. Yes, sir.

The Court:

Q. Does that mean to duplicate the body of the car?

A. That would mean practically to duplicate it; there may some number of good parts that
511 could be used, in the old body; that it would put the car in as good shape as a new car.

WILLIAM J. EIDEL, being duly sworn as a witness for defendant, testified as follows:

512 Direct Examination by Mr. Adams:

Q. What is your business, Mr. Eidel?

A. Conductor for the Pennsylvania Railroad.

Q. And you were in November, 1915?

A. Yes, sir.

Q. Were you conductor at the time Mr. Boehmer met with his accident?

A. Yes, sir. 513

Q. Did you see the accident yourself—did you see it occur?

A. I didn't see the whole accident; I saw part of it.

Q. What part did you see?

A. I saw the man after he was injured.

Q. Then you did not see the thing happen?

A. No, sir, not exactly; I didn't see it happen. 514

Q. Do you remember getting this car from the Nickel Plate that night?

A. Yes, sir.

Q. Is your recollection of that occurrence, the same as has been stated here,—in regard to the method you employed in getting that car?

A. Yes, sir.

Q. Then I won't go over it again. You did not see the train as it moved by—the engine and car? 515

A. No, sir.

Q. Where were you?

A. I was right alongside of the engine.

Mr. Adams: That is all.

Mr. Sullivan: Nothing.

516

FAY HIPWELL, being duly sworn as a witness for defendant, testified as follows:

Direct Examination by Mr. Adams:

Q. Mr. Hipwell, you are an engineman in the employ of the Pennsylvania?

517 A. Yes, sir.

Q. And have been how long?

A. Six years.

Q. Were you engineman on this train on which Mr. Boehmer was working at the time he was injured?

A. Yes, sir.

Q. On November 8th, 1915?

518 A. Yes, sir.

Q. Will you tell us just where you moved with your engine, that night after reaching Brocton, to get this car?

A. Yes, sir.

Q. Tell us as briefly as possible. Before you do that, I will ask you,—you have seen this map here on the board?

(Referring to Exhibit #1 for plaintiff).

519 A. Well, I saw the real tracks; it looks the same as that.

Q. The four yard tracks to the west of the main line of the Pennsylvania are Pennsylvania track?

A. Yes, sir.

Q. That is the Pennsylvania yard there?

A. Yes, sir.

520 Q. The Nickel Plate has how many tracks there?

A. Main track, transfer track and cross over connections.

Q. Did you receive orders to stop at this point?

A. Received an order or message at "Kr." to pick up this car?

Q. Did you pass a train there at that point, also?

A. If I remember right, we passed two there. 521

Q. They went by while you were out in the yard?

A. Yes, sir; we met two opposing trains there.

Mr. Sullivan:

Q. Where was that? At "Kr."?

A. Brocton.

522

Mr. Adams:

Q. Those were Pennsylvania trains?

A. Yes, sir.

Q. Of course, there is no connection in operation between the Nickel Plate and Pennsylvania at that point?

A. No, sir.

Q. That is simply an interchange point?

A. Simply an interchange point, through orders received from different roads using the tracks. 523

Q. Where did you pull your train into when you first got there and came off the main line?

A. At the south end of the north siding.

Q. Will you point to that?

A. Right over there we pulled in (shows).

Q. Those were Pennsylvania trains? 524

A. Yes, sir; I should have said right there (shows).

Mr. Sullivan: I do not think the point he pulled in is shown on that map; I think it was farther south.

A. It is at the present time, but repairs were made recently.

525 Q. You pulled off the main line at the south end of the yard?

A. Yes, sir.

Q. What track did you go in?

A. It doesn't show here on this map, but there is a road crossing—we pulled in up there—there is a road crossing there north of the engine house, that leads to Portland, N. Y.; the engine
526 house lead is not on there—there is an engine house lead in there; we took water and went to the engine house lead, and backed in to the coal track and got coal (shows).

Q. What track is the coal track?

A. It leads in there (shows).

Q. Just under the word "Erie" on the map?

A. Yes, sir, under the word "Erie" on the
527 map; right in there.

Q. Go ahead; then what did you do?

A. We came back to the passing siding and coupled with the train, and pulled into the clear, so that we could permit the two trains, we had orders to meet in there, to go by.

Q. You pulled in on the track shown on the map as #1?

A. Yes, sir, the north passing siding.

528 Q. How far towards the north did you pull with your train?

A. Stopped within two car lengths of this crossing (shows).

Q. That is the highway shown on the map?

A. Yes, sir, the highway shown on the map here.

Q. You were to the south of that?

A. Yes, sir. 529

Q. What did you do then?

A. Cut the engine off there and pulled down here to clear the main track (shows).

Q. To the north?

A. Yes, sir, to the north of the crossing; about in there (shows); we obtained the block receipt to occupy the main track, and to not proceed—we proceeded to lead #3.

530

Q. You had to go back in the main line again?

A. No, on the siding until we got to the lead here—passing siding track #1,—back through #3 (shows).

Q. That is to the south on #3?

A. To the south on #3, back here to the Nickel Plate connections or transfer track (shows).

Q. That is back near the word "Erie" on the map?

531

A. Yes, sir; crossed over there (shows).

Q. Over what?

A. Into the Nickel Plate, and headed in on the Nickel Plate transfer.

Q. That is indicated as "Transfer track" on this map?

A. Yes, sir. Right in there, and picked up the car; if I remember right, it was four cars deep 532
on this transfer track; we backed out and set the car on the main track, about the point there (shows).

Q. That is car T. R. E.—

A. #32203. Backed up, headed into the transfer track, with three cars ahead of us, at the point here—

533 Q. You simply set those cars back in there, where they came from?

A. Yes, sir. Took the stake off the left side of the tank of the engine, and put it between the car and the tank of the engine, and staked it back west of the points of the switch of the transfer track.

Q. That is the most southerly switch shown on
534 the map, on the Nickel Plate main track?

A. Yes, sir.

Q. Go ahead.

A. I can't recall the brakeman's name that put the stake on there.

Q. Mr. Delahant?

A. Delahant, he put the stake back on the engine, and we backed out and coupled onto the car —pulled back down and backed in what cars there
535 was into the P. R.; backed down over #3—

Q. Did Mr. Boehmer throw the switch there?

A. It was Mr. Boehmer throwed the switch for us to back out; yes, sir; he operated the switch at the time of staking, and at the time of backing out.

Q. Did you see him riding that car at any time?

536 A. I wouldn't swear that he stopped the car, but some one of the crew stopped the car over there (shows).

Q. You cannot tell about that?

A. It was one of the two men, but Delahant was working with the engine, because he is the more experienced man.

Q. Now you are back in the Pennsylvania yard?

A. Yes, sir, all ready, and headed through track #3. 537

Q. Was the main line switch closed to the Nickel Plate?

A. Yes, sir; both of them closed and locked, and the flag called in.

Q. What did you do then?

A. Proceeded through track #3.

Q. That was the same track you came out on? 538

A. Yes, sir,—down to the north end, and about the point here, the conductor—there was an understanding that the conductor would give me the sign if I had permission to occupy the main track, and back in on the passing siding; we pulled down clear of the point, about here—

Q. That is clear of the switch point where the cross mark is there (shows)?

A. Yes, sir. 539

Q. Go ahead.

A. Mr. Michael U. Boehmer gave me a stop signal about that point; I stopped, and he crossed in back of the car to the left side of the track—the left side of the engine and car, and throwed the switch for the passing siding, or track #1, and he came back to the right side of the track—

Q. That is the engineer's side? 540

A. Right side of the engine and car, and gave me the back-up signal.

Q. You were then headed north?

A. Yes, sir.

Q. In order to get back to your train, you would have to back up?

A. Yes, sir; back south.

541 Q. Go ahead.

A. We backed up—he gave me the back-up signal, and I reversed the engine, and just about the time I started to back up I looked back, and the conductor hallooed—he said, "He is going to run us," and I looked back again—

The Court:

542 Q. What does that mean?

A. That means they were going to advance us towards Buffalo let us over those tracks.

Mr. Adams:

Q. You mean you had the right to occupy the main track?

A. Yes, sir; to proceed, with proper orders. I started to back up, and placed my eyes to the rear
543 of my train, where I was supposed to—on the cars; Michael Boehmer undertook to get on the car at that point—

Q. Describe what he did, as you saw him—did you see the outline of his body?

A. I could see the outline of his body with the movement of the lamp; yes, sir.

Q. How did it appear to you that he tried to
544 get on?

A. Well, he gave me the signal to back up, and when he went to get on, it looked to me from the circle of the lamp, as though he dropped the lamp from his right arm—

Q. Tell us what you saw, the best you can?

A. He undertook to get on the car,—as near as I could see from the engine, 40 feet away,—with both hands.

Q. Did he go against the side of the car? 545

A. Yes, sir.

Q. Then did he go down?

A. He staggered backwards.

Q. Did you stop the engine?

A. I applied the brakes—the emergency; and jumped to the ground and picked him up.

Q. You saw that he had fallen?

A. Yes, sir; backwards. 546

Q. How fast were you going at the time he tried to board the car?

A. Between moving and three miles an hour.

Q. What do you mean by "between moving and three miles an hour"?

A. Moving—just started the train, or engine and car.

Q. Very slowly?

A. Yes, sir. 547

Q. You think not over three miles an hour?

A. No, sir, it was not.

Q. Were you going as fast as a man could walk?

A. I should judge not.

Q. Did you notice the lantern that he had?

A. If I remember right, he had a "Casey" lamp; that is a P. R. standard lamp. 548

Q. Used by trainmen?

A. Yes, sir.

Q. Did you observe as to the condition of light and darkness at that time?

A. If I remember right, it was a pretty dark night.

Q. You observed the condition of light and darkness there?

549 A. Yes, sir.

Q. You say you could see the outline of his body from where you were?

A. Yes, sir.

Q. You may state how far you think a man could see a grab iron or ladder on the car that night,—without any lantern at all; how close he would have to be in order to see it?

550 A. At least three or four feet beside the car, for the range of vision.

Q. How close would he have to be, with one of those ordinary lantern, in order to see the grab iron or ladder—to see whether it was there or not?

A. Eight or ten feet, if he looked up at it.

Q. I suppose that he would have to look in order to see it?

551 A. Yes, sir.

Q. Was there anything there—any obstruction between the tracks, of any sort?

A. No, sir.

Q. Was there anything to prevent a man walking alongside of that car as he went down to it?

A. No, sir.

Q. Was there anything to prevent a man from

552 reaching up and taking hold—finding out with his hand, if he could not see,—whether or not there was a grab iron there, before he left the ground?

A. No, sir.

Q. You have observed the cars used on the railroads, in connection with your work there?

A. Yes, sir.

Q. Do you know the equipment which was on this car in question?

A. I examined it after this accident happened. 553

Q. What equipment did it have? Just a minute, and I will show you a photograph. I show you two small photographs, and I ask you if they represent that car as it was that night?

(Witness shown photographs).

A. Yes, sir.

Q. The equipment shown on those photographs was on that car that night?

554

A. Yes, sir.

Q. There was a ladder on the diagonal ends?

A. Yes, sir.

Q. Diagonal corners?

A. Yes, sir.

Q. And a grab iron and sill step on the same corner as the ladder?

A. Yes, sir.

Mr. Adams: I offer the two photographs 555
in evidence.

Mr. Sullivan: No objection.

Photographs received in evidence, and marked Defendant's Exhibits No. 12 and 13.

Q. These two photographs show opposite ends of the car?

A. Yes sir.

556

Q. State whether or not, at that time, you frequently saw cars, equipped the same as this car, in use?

A. Yes, sir.

Q. How frequently, if you can tell?

A. Often

Q. That is on the Pennsylvania?

A. Yes, sir.

557 Q. You never refused cars, which came equipped that way, on the road?

A. That wouldn't concern me—I have no objection—I am not running the train.

Q. You saw them practically every day that you worked?

A. Yes, sir; on the Pennsylvania and several other roads.

Q. The newer cars are equipped differently?

558 A. According to the Standard for United States Safety Appliances.

Q. (Question read by reporter). Is that right; yes, or no?

A. Yes, sir. If I may have a word,—that is new cars, and P. R. standard cars.

Q. How far did you move by the place where Boehmer fell?

559 A. I should judge about six or eight feet.

Q. How far had you moved, from the time you started until the time he tried to get on?

A. Not over 15 feet, to 20, at most.

Q. Then he was right close to the car?

A. Yes, sir.

Q. How far away from the car was he when he gave you the signal?

A. He was standing right by the side of it.

560 Q. Had you seen him walking up and down there?

A. I did not.

Mr. Adams: That is all.

CROSS EXAMINATION by Mr. Sullivan:

Q. The reason that you could see the outline of his body was because he had a lantern?

A. Yes, sir. 561

Q. If Mr. Boehmer, as the car approached him, had raised the lantern to about the height of his face, and dropped it to his knee, and then raised it, and you had observed that, what would it indicate to you?

A. He didn't do that.

Q. If he had done it?

A. A go-ahead signal.

Q. That would have been a go-ahead signal? 562

A. Yes, sir.

Q. A man boarding a car, on the grab-iron and step, in the nighttime,— a trainman—carries a lantern—

A. Yes, sir.

Q. And he must, in getting on, throw the lantern—he must have it on his arm or in his hand, and it brings the lamp between him and 563 the car?

A. No, sir.

Q. How could he get on without doing that? It brings it in front of him, doesn't it?

A. You are not thoroughly familiar with a man boarding a car.

Q. What does he do with his lantern when he gets on a car?

A. A man receives experience day after day; 564 you find men getting on cars—they evidently get on differently, and a new man, with very little experience, gets on as cautiously as he possibly can.

Q. He uses both hands?

A. Yes, sir.

Q. Is that what you observe this man doing, on this occasion?

565 A. Yes, sir.

Q. How long have you been railroading?

A. In engine service, since the 19th of September, 1906.

Q. During that time, did you observe the trainmen in the service, in yards and otherwise?

A. Yes, sir.

Q. Did you ever observe them doing their work?

566 A. Yes, sir.

Q. Did you ever see one putting his lantern up to a car and looking for a grab iron on it?

Q. In all your experience?

A. I don't think I have ever seen a man put his lamp up there, but, as a rule, they glance at the car to see where they are going to get on.

Q. These men board those cars as a matter of

567 second nature, don't they—and instinct?

A. No, sir.

Q. How frequently have you observed cars that were not equipped on all four sides or corners with grab irons and sill steps, since 1910?

A. Since 1910?

Q. Yes?

A. Frequently.

Q. Did you observe more than one a day in

568 a day's work?

A. Yes, sir.

Q. What cars?

A. Refrigerators, of the F. G. E. and the T. R. E., and foreign chicken cars, etc., from the foreign roads—the Nickel Plate especially.

Q. A few from the Grand Trunk?

A. Yes, sir.

Q. Occasionally one from the Southern Pacific?

A. Yes, sir, I have seen Southern Pacific cars, 569
—to-day—not to-day, but when I work.

Q. Up, since 1916?

A. Yes, sir.

Q. Occasionally a Chicago & North Western?

A. Yes, sir.

Q. And once in a while a Seaboard?

A. Yes, sir. I saw a Seaboard in the Buffalo yards about two weeks ago.

Q. Can you recall any other lines outside of 570
those I have mentioned?

A. The Monon Railroad.

Q. What is that?

A. A southern railroad; the lettering alongside of the car is "Monon."

Q. They are not very frequent in this locality?

A. Over the P. R. occasionally, loaded with coal; but I haven't seen any lately—within a 571
year.

Q. So that, outside of a few odd cars from the roads I have mentioned, and some of the refrigerator line cars, you scarcely ever see a car of any other system that is not equipped on all four corners with grab irons and sill steps?

A. No, sir.

Q. And that has been so for the last five, six
or seven years? 572

A. Yes, sir.

Mr. Sullivan: That is all.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. You say you saw several each day, on an average?

A. Cars of foreign roads; yes, sir,

573 Q. At the present time?

A. Yes, sir.

Q. And at the time of the accident?

A. Yes, sir.

Q. Of course, you are all the time hauling cars of foreign roads, are you not?

A. Yes, sir.

Q. Pennsylvania traffic is not moved entirely by Pennsylvania cars?

574 A. Indeed not.

Q. Have you any idea of the percentage of foreign cars, on an average?

A. I have noticed particularly over the Nickel Plate, where they haul a considerable number of cars of that description, not equipped according to the United States safety appliances.

Q. That is at the present time?

575 A. Yes, sir.

Q. By that you mean with four ladders—

A. Yes, sir, and grab irons and footsteps.

Q. On all corners?

A. Yes, sir.

Q. Those cars that are not equipped are almost all of them old cars?

A. From the looks of them,—yes, sir—passing by.

576 Q. You say, if he had raised his lantern and placed it up and down alongside of the car, it would have been a go-ahead signal?

A. I said, if he done that, it would have been.

Q. You said, in answer to Mr. Sullivan's question, that men working around trains, usually look to see whether or not there are grab irons on cars before trying to board a car?

Mr. Sullivan: He did not say that in answer to my question; I did not ask him that question; I asked him if he ever saw one looking with a lantern. 577

A. I said, "No, sir."

Q. Do they usually make observations to see whether or not there are grab irons on cars before mounting them?

Mr. Sullivan: I do not see how the witness can tell, unless he saw them looking with a lantern. 578

The Court: The objectionable part of the question is the use of the word "usually"; if there is any specific instance, you may have it.

Mr. Adams: Mr. Sullivan asked as to the general custom of making observations. 579

The Court: He asked if he had ever observed them doing their work.

Q. Have you ever seen the men mounting cars without looking at them?

A. Yes, sir, on duty and off duty,—watching men board cars, —I have; they usually glance to see where they are going to get on.

RE-CROSS EXAMINATION by Mr. Sullivan: 580

Q. They glance at the cars as they are approaching?

A. As the car approaches him, to see where he is going to get on; yes, sir.

Q. But these grab irons and end sills were in fixed locations on these cars?

A. Yes, sir.

581 Q. You say this man went against the car—his hands went against the car?

A. We went up against the car, with the intention of getting on with both hands.

Q. Were his hands, as you observed them, at or about the point on this car where the grab-irons usually are?

A. Yes, sir.

582 Q. Did you notice whether he had his foot raised, to take a step, or not?

A. He said he did, when I picked him up.

Q. You did not observe that?

A. I observed the outline of his body from the movement of his lantern.

RE-DIRECT EXAMINATION by Mr. Adams:

583 Q. If he had given you the go-ahead signal, or if he had put his lantern up and down, that way, (shows) what would you have done with your engine?

A. I would have gone ahead.

Q. You would have gone in the opposite direction?

A. Yes, sir.

Q. How far would you have gone?

584 A. I would have gone ahead until he gave me the stop signal.

Q. Have you observed the practice of mounting cars, as far as putting the foot on the stirrup or sill step, before taking hold of the grab iron, is concerned? Have you observed that?

A. Yes, sir.

Q. Is there or is there not a custom among railroad men to take hold of the grab iron first?

A. Yes, sir. 585

Q. It is customary to take hold of the grab iron first?

A. Yes, sir, it is the custom to take hold of the grab iron first.

Q. As a matter of fact, is it possible, from your experience, for a man to lift his foot up into the stirrup—to get it up there, without taking hold of the grab iron first?

A. No, sir, it is not. 586

Q. About how far, or how high above the ground would the stirrup be on the car in question?

A. I did not have the privilege of measuring this car, but I should judge, from the looks of it, about 26 or 28 inches, maybe three feet.

RE-CROSS EXAMINATION by Mr. Sullivan: 587

Q The movement is, as the car approaches, the man faces towards the car, with his hands out, (shows) and at the same time raises his foot, and when he gets it, he swings aboard? (Shows).

A. If a man is going to get on a car as a train is passing, he would look—as a rule, new men go up with both hands, which Mr. Bochmer told me himself, personally, the night when I picked him up; didn't you, Mike? 588

Mr. Adams: Never mind that.

Q. Isn't the customary way as I have stated?

A. As a rule, they swing in the opposite direction, not against the car.

Q. As it approaches, you put up your hands in that way, to get the iron, and swing with the car as it passes?

589 A. Yes, sir; into the stirrup.

Mr. Adams:

Q. But they get the iron, first, in their hand?

A. Yes, sir.

Mr. Sullivan:

Q. But the hand and foot are almost together —it is only a fraction of a second between the time
590 the iron is grabbed and the foot goes in the stirrup?

A. They sometimes step on the brake of the car.

Q. Sometimes they make the oil box, or something else?

A. The brake frame or a brace.

Mr. Adams: I offer in evidence six photographs. Mr. Sullivan consents that I
591 make a statement as to the details—

Mr. Sullivan: Not the details.

Mr. Adams: What they show.

Mr. Sullivan: I suppose they show for themselves.

Mr. Adams: I offer one marked "A" in the center of the end of the car.

Photograph received in evidence, without
592 objection, and marked Defendant's Exhibit #14.

Mr. Adams: I offer another, which is marked "B" at the end of the car.

Photograph received in evidence, without objection, and marked Defendant's Exhibit #15.

Mr. Adams: I offer another which is marked on the extreme left, "A—L," which

means the left side of "A" end. This photograph has been previously marked Exhibit #5, for identification. 593

Photograph, marked Defendant's Exhibit #5, for identification, received in evidence, without objection, as Defendant's Exhibit #5.

Mr. Adams: These are all photographs that were identified by Mr. Laughlin, and marked in a bunch. 594

I offer another marked on the extreme right of the car, "A—R," which means the right side of the "A" end.

Photograph received in evidence, without objection, and marked Defendant's Exhibit #16.

Mr. Adams: I offer another which is marked on the extreme right of the car, "B—L," which means the left side of the "B" end. 595

Photograph received in evidence, without objection, and marked Defendant's Exhibit #17.

Mr. Adams: I offer another marked on the extreme left "B—R," which means the right side of the "B" end.

Photograph received in evidence, without objection, and marked Defendant's Exhibit #18. 596

Mr. Adams: If I may be permitted to state for the record, this set shows both ends of the car, and all four corners.

597 PATRICK J. MULLIGAN, being duly sworn as a witness for defendant, and testified as follows:

Direct Examination by Mr. Adams:

Q. You are a fireman, in the employ of the Pennsylvania?

598 A. Yes, sir.

Q. You were the fireman attached to this crew, on November 8th, 1915, at the time Mr. Boehmer was hurt?

A. Yes, sir.

Q. Did you see the accident at all?

A. No, sir.

Q. Did you know anything about it until after it was over?

599 A. No, sir.

Q. How soon after it happened did you know about it?

A. After they picked him up, and laid him over on the path across the street.

Q. You were on the opposite side of the engine from the side on which he was located at the time he was hurt?

A. Yes, sir.

600 Q. Can you tell anything about how fast the engine was moving at that time?

A. No, sir.

Q. You did not notice about it?

A. No, sir.

Mr. Adams: That is all.

Mr. Sullivan: That is all.

Mr. Adams: I offer in evidence Rule "O" in the Book of Rules, which has been

read before by the plaintiff himself. I will 601
read it into the record.

"Employees must examine, and know for themselves, that the grab irons, brake shafts and attachments, running boards, steps and all other parts of cars and engines which they are to use, and all mechanical appliances, tools, supplies and facilities of every kind, of which they must make use in performing their duties, are in proper condition; if not, they must put them so, or report them to the proper person and have them put in order before using." 602

Mr. Sullivan: I object to that. The presence of these safety appliances is a matter of absolute duty, and no rule of that kind can throw the responsibility upon the employee. 603

Mr. Adams: The rules are already in evidence, offered by Mr. Sullivan.

The Court: Received.

Rule in question, received in evidence, and marked Exhibit #19, for defendant.

Mr. Adams: I also offer in evidence Rule 102-A, read by the plaintiff:

"When a train is shifting over a crossing, where there is no watchman, a trainman must be stationed on the crossing to give warning to persons using same." 604

The Court: Received.

Recess taken until 2:00 o'clock, p. m.

Afternoon's proceedings.

Mr. Adams: I now offer in evidence Exhibits #7 and #8, for identification, being the record of the change of the number, tes-

605 tified to by Mr. Laughlin yesterday and this morning.

Papers received in evidence, without objection, as Defendant's Exhibits #7 and #8.

Mr. Adams: That is our case.

Defendant rests.

606

DANIEL J. DELAHANT, re-called for plaintiff:

Direct Examination by Mr. Sullivan:

Q. Mr. Delahant, how long have you run through Brocton in the services of the Pennsyl-
607 vania Railroad?

A. Off and on, all the time I was employed there.

Q. About two or three years?

A. About three and one-half years.

Q. Do you know what provision was made for the inspection of cars by the Pennsylvania Railroad Company at that yard and transfer point?

Mr. Adams: I object to it as not proper
608 rebuttal.

The Court: The question is, "Do you know?"

Mr. Adams: Yes, or no.

A. What is the question?

Q. Do you know whether any provision was made for the inspection of cars received from the Nickel Plate at that yard?

Mr. Adams: I object to it as not proper

rebuttal, incompetent, immaterial and ir- 609
relevant, and not an issue to this case.

The Court: What is this rebuttal of?

Mr. Sullivan: I presume it is claimed that this plaintiff should have inspected this car.

The Court: As an inspector?

Mr. Sullivan: Yes, sir; or its equipment when it was received from the Pennsylva- 610
nia.

The Court: That the plaintiff should have done that?

Mr. Sullivan: The defendant will argue that to the jury.

Mr. Adams: I make no claim that Mr. Boehmer was a car inspector, on duty at Brocton.

Mr. Sullivan: I want to show they had 611
a man at Brocton to inspect cars, and pass on what cars the railroad should receive.

The Court: At Brocton?

Mr. Sullivan: Yes, sir.

The Court: I do not understand that Mr. Adams offered any evidence to show there was any inspector there, or that there was not.

Mr. Sullivan: Mr. Keating said it was 612
the practice and custom, at interchange points, that the railroads receiving cars—to have at interchange points a man to inspect cars and pass on them before the other roads would receive them.

The Court: If there is anything in this question which rebuts the testimony given by Mr. Keating, you are entitled to it.

613 Mr. Sullivan: It does not rebut,—it corroborates it.

The Court: Then it would not be admissible.

Mr. Sullivan: He has called out and read in evidence Rule "O," that employees must examine, and know for themselves, that the grab irons, brake shafts, etc., are in proper condition."

614 The Court: You maintain the rule cannot do away with the statute?

Mr. Sullivan: I do so maintain; I offer to make that proof.

The Court: I do not see that it is proper rebuttal; I will exclude it.

Mr. Sullivan: Exception.

The Court: Exception noted.

615 Mr. Sullivan: That is all. We rest.

Evidence closed.

Mr. Adams: I renew the motion made at the close of the plaintiff's case, for a nonsuit and dismissal of the complaint, on the grounds then stated; and I now make a motion for a direction of verdict in favor of the defendant for no cause of action, on the grounds stated in my motion for nonsuit,

616 and also on the ground that the proof establishes there was no violation of the Safety Appliance Act, as alleged in the complaint,—that being the basis of this action.

Also, on the ground that there is no evidence in the record of any negligence on the part of the defendant railroad company, and also upon the ground that the evidence

affirmatively shows there was no negligence on the part of the defendant. 617

I move further on the ground that the evidence affirmatively shows that the sole proximate cause of this accident and injury was the contributory negligence of the plaintiff.

I move further on the ground that the risks of accident such as they allege in the complaint, and proven here upon the trial, were so obvious that the plaintiff assumed those risks; and also upon the ground that the risks of accident were inherent in the nature of the business—in other words, they were the necessary risks of the occupation in which he was engaged. 618

(Argument by counsel in support and opposition to motion; authorities cited; argument on meaning of Sections of I. C. C. order, etc. * * *). 619

The Court: We will take a short recess.

(Proceedings after recess).

The Court: The motion made by counsel for the defendant is granted.

Mr. Sullivan: I ask to go to the jury on the issues raised under the Safety Appliance Act. 620

The Court: Motion denied.

Mr. Sullivan: Exception.

The Court: Exception noted.

Mr. Sullivan: I want an exception to the granting of the motion; and I ask that the court submit to the jury the question of the defendant's negligence, as raised by the pleadings and the evidence, for their fail-

621 ure to instruct and warn the plaintiff of the dangers involved in the handling of cars not equipped in accordance with the standards of the Safety Appliance Act, under the rules of the Interstate Commerce Commission.

The Court: Denied.

Mr. Sullivan: Exception.

The Court: Exception noted.

622 Mr. Sullivan: I also ask to go to the jury on the question of their negligence in that they handled cars, and failure to warn the plaintiff that they would and did handle cars, or instruct him that they would handle cars not equipped in accordance with the standard under the Safety Appliance Act, and of the rules of the commis-

623 sion.

The Court: Denied.

Mr. Sullivan: Exception.

The Court: Noted.

Mr. Sullivan: I ask to go to the jury upon all the questions raised by the pleadings and the evidence, in that they did not instruct, inform and warn the plaintiff that he would be required to accept and handle

624 cars, in the line of his duties, without any grab irons, handholds or stirrups thereon.

The Court: Denied.

Mr. Sullivan: Exception.

The Court: Exception noted.

The Court: Mr. Foreman and Gentlemen: On the questions of law here presented, I feel the motion made by counsel for the defendant should be granted; in accord-

ance with the granting of the motion— 625
which was that the court should direct a verdict for the defendant—you will return a verdict for the defendant, under the court's direction.

Mr. Clerk, you will take the verdict.

Jury return a verdict in favor of defendant of "no cause of action," in accordance with the direction of the court.

Mr. Sullivan: I do not know whether 626
this court follows the practice of the State courts, or whether it is necessary in this court * * * but I move for a new trial, on this case on the exceptions taken on the trial, and on the ground that the verdict is contrary to the law and contrary to the evidence.

The Court: I will deny the motion. I do 627
not know as it is necessary.

Mr. Sullivan: Exception.

ORDER FILING CASE.

The foregoing, containing all the proceedings upon the trial of this cause, is hereby allowed as the bill of exceptions herein, and it is 628

ORDERED, that so much of the testimony as is contained herein in the words of the witnesses be set forth in full without reduction to narrative form, and said bill of exceptions is hereby settled, signed, sealed and ordered filed *nunc pro tunc* as of April 30, 1917.

EDWIN S. THOMAS,
United States District Judge.

629 STIPULATION.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions may be allowed, signed, sealed and ordered filed as of April 30, 1917, A. D.

Dated, Buffalo, New York, April , 1917.

630 SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff-in-Error.

RUMSEY & ADAMS,
Attorneys for Defendant-in-Error.

PETITION FOR WRIT OF ERROR.

631 UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,
against
PENNSYLVANIA RAILROAD COMPANY,
632 *Defendant.*

Michael U. Boehmer, the plaintiff in the above entitled cause, feeling aggrieved by the verdict of the jury as directed by the court and the judgment entered on the 5th day of April, 1917, now comes by Sullivan, Bagley & Wechter, his attorneys, and petitions this court for an order allow-

ing said plaintiff to prosecute a writ of error to 633
the Honorable, The United States Circuit Court of Appeals for the Second Circuit, under and according to the laws of the United States in that behalf made and provided; and your petitioner having filed a bond in the sum of two hundred and fifty ($250) dollars, approved by this court, to answer all damages and costs awarded by the Circuit Court of Appeals in case said judgment shall
be affirmed, that an order be made that the bond 634
filed shall operate as a supersedeas upon said writ of error, and that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

SULLIVAN, BAGLEY & WECHTER, 635
Attorneys for Plaintiff,
809-812 Chamber of Commerce,
Buffalo, New York.

636

ASSIGNMENT OF ERRORS.

637 UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,

against

PENNSYLVANIA RAILROAD
638 COMPANY,
Defendant.

The above named plaintiff hereby assigns error in the proceedings and judgment of this court, as follows:

1. In excluding evidence offered by the plaintiff through the witness, Daniel J. Delahant, in
639 answer to the question: "Do you know whether any provision was made for the inspection of cars received from the Nickel Plate at that yard, to wit, yard of the defendant at Brocton, New York"? which evidence was excluded upon the objection of the defendant and an exception taken by the plaintiff.

2. In granting the motion of the defendant for
640 a direction of verdict in favor of the defendant and against the plaintiff.

3. In denying the request of plaintiff to submit to the jury the issues raised under the Safety Appliance Act.

4. In denying the plaintiff's motion that the court submit to the jury the question of defend-

ant's negligence as raised by the pleadings and evidence for its failure to instruct and warn the plaintiff of the dangers involved in the handling of cars not equipped in accordance with the standards of the Safety Appliance Act under the Rules of the Interstate Commerce Commission. 641

5. In denying plaintiff's motion to submit the case to the jury on the question of defendant's negligence in that it handled cars and failed to warn plaintiff that it would and did handle cars, or instruct him that it would handle cars not equipped in accordance with the standard under the Safety Appliance Act and of the Rules of the Commission. 642

6. In denying plaintiff's request to submit the case to the jury upon all the questions raised by the pleadings and evidence, in that the defendant did not instruct, inform or warn the plaintiff that he would be required to accept and handle cars in the line of his duties without any grab irons, hand holds or stirrups. 643

7. In directing the jury that on the question of law here presented, said jury should return a verdict for the defendant under the court's direction of "no cause of action." 644

8. In that the court deny plaintiff's motion for a new trial.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff,
809-812 Chamber of Commerce,
Buffalo, New York.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

645

At a Term of the District Court of the United States for the Western District of New York, held at the City of Buffalo on the 21st day of April, 1917.

Present: Honorable John R. Hazel,
District Judge.

646 UNITED STATES DISTRICT COURT.

WESTERN DISTRICT OF NEW YORK.

MICHAEL U. BOEHMER,
Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,

647 *Defendant.*

Upon motion of Sullivan, Bagley & Wechter, attorneys for the plaintiff, Michael U. Boehmer, and on filing the petition for Writ of Error and Assignment of Errors, it is.

ORDERED, that the Writ of Error be and here-
648 by is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore entered herein, and that the bond heretofore filed by the plaintiff-appellant in the sum of two hundred and fifty dollars herein shall operate as a supersedeas on said Writ of Error.

JOHN R. HAZEL,
District Judge.

WRIT OF ERROR.

The President of the United States to the honorable Judge of the District Court of the United States for the Western District of New York. 649

GREETING:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Michael U. Boehmer, plaintiff and 650
Pennsylvania Railroad Company, defendant, a manifest error happened to the great damage of the said Michael U. Boehmer as by his complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and separate justice done to the parties aforesaid in this behalf, 651
do command you if judgment be therein given, that then under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ so that you have the same at the City of New York in the State of New York on the 21st day of May, 1917, next in the said Circuit Court of Appeals to be then and 652
there held, that the records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, that of right, according to the laws and customs of the United States, should be done.

Citation.

653 WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States the 21st day of April, 1917.

JOHN R. HAZEL,
District Judge.

S. W. Petrie,
Clerk of the United States District
Court for the Western District
654 of New York allowed by the
Judge of the United States Dis-
trict Court for the Western Dis-
trict of New York.

CITATION.

655 *The President of the United States to the Pennsylvania Railroad Company and Rumsey & Adams, its attorneys,*

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be held at the City of New York in the State of New York within
656 thirty (30) days from the date of this writ, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of New York, wherein Michael U. Boehmer is plaintiff and Pennsylvania Railroad Company is defendant, to show cause, if any there be, why the Writ of Error mentioned should not be granted and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward D. White, 657
Chief Justice of the Supreme Court of the United States of America, this 21st day of April, 1917, and of the Independence of the United States the one hundred and forty-first.

JOHN R. HAZEL,
District Judge.

658

STIPULATION AS TO MANUSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MICHAEL U. BOEHMER,
Plaintiff-in-Error,
659
against
PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys, that the transcript of record upon the review in the above entitled action, upon the writ of error, shall consist of the complaint, notice of appearance, answer, bill of exceptions, order denying motion for new trial, clerk's minutes, judgment, petition for writ of error, assignment of errors, order allowing writ, writ of error, citation, clerk's certificate, transcript of the evidence and 660

661 proceedings, and stipulation as to exhibits not printed.

Dated, Buffalo, New York, April 21st, 1917.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff-in-Error.

RUMSEY & ADAMS,
Attorneys for Defendant-in-Error.

662

STIPULATION AS TO EXHIBITS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MICHAEL U. BOEHMER,
Plaintiff-in-Error,
against
663 PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

IT IS HEREBY STIPULATED by the parties hereto, by their respective attorneys, that all the exhibits introduced and filed in the above cause, except such as are printed in the transcript of the record herein need not be included in the transcript of record, but the same may be used upon the
664 argument of the rWit of Error herein with the same force and effect as if included in the Transcript of Record.

Dated, Buffalo, New York, April 21st, 1917.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff-in-Error.

RUMSEY & ADAMS,
Attorneys for Defendant-in-Error.

STIPULATION THAT PRINTED COPY IS A TRUE TRANSCRIPT.

665

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MICHAEL U. BOEHMER,
Plaintiff-in-Error,

against

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

666

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys, that the foregoing and annexed printed copy is a true transcript of the record upon the review in the above entitled cause upon the Writ of Error.

667

Dated, Buffalo, New York, April 21st, 1917.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff-in-Error.

RUMSEY & ADAMS,
Attorneys for Defendant-in-Error.

668

CLERK'S CERTIFICATE.

669 United States of America, } ss.:
Western District of N. Y. }

I, SIDNEY W. PETRIE, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing and annexed printed copy has been presented to me with a stipulation by the attorneys of the parties; that such printed copy is
670 a true transcript of the record of Writ of Error from the United States Circuit Court of Appeals, Second Circuit, to review a judgment of the United States District Court for the Western District of New York, in the action in said District Court, entitled Michael U. Boehmer, plaintiff, against Pennsylvania Railroad Company, defendant, as agreed on by parties, and I do certify the same to
671 be a transcript of record upon said review.

IN WITNESS WHEREOF, I have caused the seal of said court to be affixed at the City of Buffalo in said district, this.....day of April, 1917, A. D.

SIDNEY W. PETRIE,
Clerk.

(Seal of Court).

672

United States Circuit Court of Appeals for the Second Circuit.

No. 113, October Term, 1917.

Argued December 12, 1917; Decided May 10, 1918.

MICHAEL U. BOEHMER, Plaintiff-in-Error,

v.

PENNSYLVANIA RAILROAD COMPANY, Defendant-in-Error.

In Error to the District Court of the United States for the Western District of New York.

Before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge.

Writ of error to a judgment of the District Court for the Western District of New York (Thomas, J., presiding), dismissing a complaint after trial for failure of proof; the jurisdiction of the District Court depended upon diverse citizenship and on the Safety Appliance Act.

The action was for injuries caused to the plaintiff by one of the defendant's cars while he was in the defendant's employ, through the supposed negligence of the defendant. The specific failures charged were the improper equipment of the car with grabirons and sills in accordance with the statute, and in failing to instruct the plaintiff that the defendant would operate such cars along with those properly equipped. The facts disclosed upon the trial were that the plaintiff engaged with the defendant as a brakeman in September, 1915, had taken a student trip, so-called, over the entire system and at the time of the accident, in the night of November 8, 1915, was employed in switching freight cars at Brockton, New York. A refrigerator car, not the property of the defendant, stood upon the Nickel Plate tracks and was to be transferred into a freight train being made up by one of the defendant's engines and crew to which the plaintiff was detailed. It became necessary to take this car out of the train where it stood and drill it into the proposed train. At some stage of this manœuvre the car was shunted along the track and the plaintiff tried to board it so as to get to the top and put on the brakes. He chose one corner of the car at which there was no grabiron and no sill, putting his hands where he supposed the grabiron would be and his foot where he supposed the sill would be. He fell under the car and his foot was crushed and had to be amputated. It was dark at the time and he carried a lantern. The car in question had a grabiron on each side of the car at one corner, where the pin lever for coupling and uncoupling extends along the end nearly to the corner. It had other grabirons on each end of the car

at the side opposite to the pin lever and had two ladders, one on each end of the car at the same side as the pin lever.

Two charges are made, first, that the car was not properly equipped under the Safety Appliance Act, and second, that the defendant ought to have warned the plaintiff that some of the cars which it handled were not equipped according to the more modern requirements which provided that there should be two grabirons on each side of the car, with sills beneath them.

Thomas A. Sullivan, for the Plaintiff-in-Error.
H. J. Adams, for the Defendant-in-Error.

LEARNED HAND, *D. J.*:

The only statutory requirement applicable to this car at the time in question was that of §4 of the Act of March 2, 1893, which provides as follows: "Until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholes in the ends and sides of each car for greater security to men in coupling and uncoupling cars." The first question is whether this provision was not fulfilled. At each end of the car there was a pin lever operating the automatic coupler; this pin-lever came out nearly to the corner; at each side near to these corners was a grab iron and a sill so situated that a man could use them while operating a pin-lever. There were also grabirons on each end of the car opposite to where the pin-levers were. It appears to us that the language of the section was complied with. It is clear that the number of grabirons was not specified and it is only by the Act of April 14, 1910, as amended by that of March 4, 1911, that the number of grabirons could be prescribed by the Interstate Commerce Commission. Since that time the Interstate Commerce Commission has provided that there shall be grabirons on both ends of each side of the car, with sills under them and ladders on each side of each end of the car. This, however, is a new provision, and not in effect on November 8, 1915. Section four of the Act of 1893 was designed to promote the safety of the "men in coupling and uncoupling cars," and the grabirons on the side were probably included to give some hold while the men operated the pin-levers. We do not see, however, how a grabiron on the side of the car away from that towards which the pin-lever extended could by any construction be of assistance in coupling and uncoupling. If a man was coupling or uncoupling on the side opposite to that at which the pin-lever came out he could do nothing without going between the cars, as there was no other way in which he could reach the coupling devices. While in there he was entitled to the protection of a grabiron at the end of the car, which he had in this case, but a grabiron at the side of the car at that point would have been absolutely no protection to him, as he could not possibly have reached it in case of emergency. So it seems to us that the only grabirons on the side of the car contemplated by the Act of 1893 were the two actually in place on the car in question.

The later provision for four grabirons on the sides of the car goes along with the requirement for two ladders on each end of the car, so that a man may swing to the sill and mount the ladder, but it could not be a protection in coupling and uncoupling cars. We therefore conclude that the Act of 1893 was not violated by the car in question.

The remaining question is whether the defendant owed the plaintiff a duty to inform him that some of the cars had grabirons on only two corners, while others had not. The proportion between those cars equipped on all four corners and those equipped on two does not appear. We have only the statement of the engineer that he saw several such cars every day, which we accept as equivalent to saying that any man in the service of the company would encounter them daily several times. Therefore as to men whom custom had familiarized with the existing conditions, it can hardly be said that instructions would have added anything to the facts patently and repeatedly before them. If that very custom betrayed them in a given instance, it was for lack of an equipment which should respond to the inevitable inattention that long custom breeds, and such equipment happily now exists. Instructions would not help in such a situation, and we cannot charge the defendant with what would have been an idle thing.

As to green men, the case is different; I have some doubt whether we should assume that they would necessarily observe such relatively exceptional equipment. While it was a most unexpected thing to happen, it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits, that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense.

None of the authorities that are mentioned by either party seem to us to have any place in the discussion. Of course, we do not assume that the Act of 1893 was abrogated by the Act of April 14, 1910, or of March 4, 1911, Illinois Central Ry. Co. v. Williams, 242 U. S. 462. U. S. v. Norfolk & Western, 184 Fed. R., 99, and U. S. v. B. & O. Ry., 184 Fed. R., 94, do not decide that handholds and grabirons are necessary on both ends of each side of the cars, as the plaintiff contends.

Judgment affirmed with costs.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 20th day of May, one thousand nine hundred and eighteen.

Present: Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges; Hon. Learned Hand, District Judge.

MICHAEL U. BOEHMER, Plaintiff in Error,

v.

PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

Error to the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

C. M. H.

L. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. M. U. Boehmer v. Penn. R. R. Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 20, 1918. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 175, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Michael U. Boehmer, Plaintiff in Error, against Pennsylvania Railroad Company, Defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of August, in the year of our Lord One Thousand nine Hundred and Eighteen and of the Independence of the said United States the One Hundred and Forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

177 United States Circuit Court of Appeals for the Second Circuit.

MICHAEL U. BOEHMER, Plaintiff in Error,

against

PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

It is Hereby Stipulated by and between the respective parties hereto by their respective attorneys, that the record on appeal in the Circuit Court of Appeals, to be certified to the Supreme Court upon the application for a writ of certiorari to review the decision of the Circuit Court of Appeals in this case, shall include, and the Clerk of the Circuit Court of Appeals is hereby authorized and directed to include in said certified record from Plaintiff's Exhibit #4, the order of the said commission found on page- 1 and 2, together with the paragraphs relating to sill-steps on pages 4 and 5, and the paragraphs relating to side hand-holds found on page 6, which exhibit was offered in evidence and referred to at fols. 380 to 387 inclusive, of the Record, and also Defendant's Exhibits #9 and #10 offered and referred to in the Record at fols. 463 to 465 inclusive, and that the other exhibits need not be included, except six photographs to be attached to one certified copy of record.

Dated July 30th, 1918.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff.

RUMSEY & ADAMS,
Defendant's Attorneys.

178 PLAINTIFF'S EXHIBIT #4.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of March, A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

In the Matter of Designating the Number, Dimensions, Location, and Manner of Application of Certain Safety Appliances.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling com-

mon carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Cimmission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, enghteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause
179 shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively; and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

Box and Other House Cars.

180 Sill-Steps:

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half (½) by one and one-half (1½) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably (12), inches.

Minimum clear depth, eight (8) inches.

181 Location: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

182 Side-Handholds.

Number: Four (4).

[Tread of side-ladder is a side-handhold.]

Dimensions: Minimum diameter, five-eights (⅝) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2) preferably two and one-half (2½), inches.

Location: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, except as provided above, where tread of ladder is a handhold. Clearence of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

183 DEFENDANT'S EXHIBIT No. 9.

Interstate Commerce Commission.

Order.

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 13th day of March, A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

In the Matter of the Extension of the Period Within Which Common Carriers shall Comply With the Requirements of an Act Entitled, "An Act to Supplement 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes and their Locomotives with Driving Wheel Brakes and for other Purposes,' and other Safety Appliance Acts, and for other Purposes," Approved April 14, 1910, as Amended by "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June 30, 1912, and for other Purposes," Approved March 4, 1911.

Whereas, pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act aforesaid and section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts"; and whereas
184 the matter of extending the period within which common carriers shall comply with the provisions of section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

It is ordered, That the period of time within which said common carriers shall comply with the provisions of section 3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby extended as follows, to wit:

Freight-Train Cars.

(*a*) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, or to change the end ladders on such cars, except when such appliances

are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(*b*) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other than those designated in paragraph (*a*) to comply with the standards prescribed in said order.

(*c*) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order, in respect of all brake specifications contained therein, other than those designated in paragraphs (*a*) and (*b*), on cars of all classes.

(*d*) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have 10 or more inches end-ladder clearance, within 30 inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(*e*) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than 10 inches end-ladder clearance, within 30 inches of side of car, to comply with the standards prescribed in said order.

(*f*) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps, and brake staffs: Provided, That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(*g*) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appli-
185 ances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

Passenger-Train Cars.

(*h*) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

Locomotives, Switching.

(*i*) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

Locomotives, Other Than Switching.

(*j*) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

A true copy.

EDW. A. MOSELEY,
Secretary.

186 DEFENDANT'S EXHIBIT 10.

Order.

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 2d day of November, A. D. 1915.

In the Matter of the Application of Certain Railroad Companies for a Further Extension of Time Within Which to Make Their Freight Cars Conform to the Standards of Equipment of Freight Cars as Prescribed by the Commission Pursuant to the Provisions of Section 3 of An Act to Supplement the Safety Appliance Acts (Public No. 133), Approved April 14, 1910, as Amended by "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June 30, 1912, and for Other Purposes," Approved March 4, 1911.

It appearing, That certain railroad companies have made application for a further extension of time within which to comply with the provisions of section 3 of an act to supplement the safety appliance acts, approved April 14, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911; upon full hearing and for good cause shown:

It is ordered, That the period of time heretofore granted to common carriers subject to the act above stated by paragraphs (*b*), (*c*), (*e*), and (*f*) of the order of the Commission duly entered on March 13, 1911, "In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled, 'An act to supplement "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes," and other safety appliance acts, and for other purposes,' approved April 14, 1910, as amended by 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other

purposes,' approved March 4, 1911," be, and the same is hereby, further extended for a period of 12 months from July 1, 1916.

And it is further ordered, That a copy of this order be served upon all common carriers subject to said act.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

187 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Michael U. Boehmer is plaintiff in error, and Pennsylvania Railroad Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
188 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER.
Clerk of the Supreme Court of the United States.

189 [Endorsed:] File No. 26,705. Supreme Court of the United States, No. 619. October Term, 1918. Michael U. Boehmer, vs. Pennsylvania Railroad Company. Stipulation of Record on Return of Writ of Certiorari. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1918. William Parkin, Clerk.

190 Supreme Court of the United States.

MICHAEL U. BOEHMER, Plaintiff in Error,

against

PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

It is Hereby Stipulated By and between the respective parties to the above entitled action that the certified transcript of record and stipulated exhibits sent up by the Clerk of the Circuit Court of Ap-

peals to the Supreme Court, in the above entitled action, which is numbered 619, October Term, 1918, of the Supreme Court of the United States, on the application for a Writ of Certiorari to review the decision of the Circuit Court of Appeals, which Writ of Certiorari was granted on the 31st day of October, 1918, can be taken as a return to the said Writ. It is further

Stipulated, That the material and photographic exhibits may be filed with the Clerk of the Supreme Court, or with the Marshal thereof, pursuant to the rule, one month before said case comes to argument, and that the same may be used to the same effect as if printed in the record.

Dated, Buffalo, N. Y. November 12, 1918.

SULLIVAN, BAGLEY & WECHTER,
Attorneys for Plaintiff in Error.
RUMSEY & ADAMS,
Attorneys for Defendant in Error.

191

[Endorsed:] For Certification. U. S. Circuit Court of Appeals for the Second Circuit. Michael U. Boehmer, Plaintiff in Error, against Pennsylvania Railroad Co., Defendant in Error. Copy Stipulation. Sullivan, Bagley & Wechter, Attorneys for Plaintiff, 809-812 Chamber of Commerce Building, Buffalo, N. Y. Due and personal service of the within and notice of entry is hereby admitted this — day of —, 191—. Attorney for——.

192 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention iswithin made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York November 15th, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Michael U. Boehmer v. Pennsylvania R. R. Co. Return to Certiorari.

[Endorsed:] File No. 26,705, Supreme Court U. S. October Term, 1918. Term No. 619. Michael U. Boehmer, Petitioner, vs. Pennsylvania R. R. Co. Writ of Certiorari and Return. Filed Nov. 19, 1918.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

MICHAEL U. BOEHMER,
Petitioner,

AGAINST

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

No. .....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief Thereon

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Michael U. Boehmer, respectfully represents as follows:

That on the 20th day of May, 1918, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of the District Court theretofore rendered against the petitioner in a suit in which he was the plaintiff and the Pennsylvania Railroad was the defendant.

This action was brought by the petitioner to recover damages for personal injuries received by him while employed as a brakeman on a car engaged in interstate commerce at the interchange yard in the Village of Brocton,

N. Y., at four o'clock on the morning of the 8th day of November, 1915.

The petitioner, a man 32 years of age, was first employed by the respondent as a carpenter in its signal department in the year 1914 or 1915, and in that capacity (R., fol. 71) traveled over its railroad system in a car where the men lived, but in that connection he had nothing to do with the operation of cars or trains (R., fols. 81, 82). In the month of September, 1915, he was employed by the respondent as a brakeman and had his workout at Corry, Pa., and after making the student trip, which consisted of one complete round trip over the entire system of this division, he was then given certain other similar work on other branches of the road, in all of which he was required to couple and uncouple cars and board them (R., fols. 83-87).

His first regular trip on a train to Buffalo, N. Y., was on the occasion of the injury complained of, the employment and character of the work on that trip being similar to that upon which he had theretofore been employed (fols. 88-89). On this trip his train stopped at Corry, Pa., (fols. 91, 92), and then proceeded to Brocton, New York, where it became necessary to shift certain cars in order to pick up one to be carried to its destination at another point farther on. In the course of the operation the petitioner was instructed to remain at a certain point and when a designated car had been shoved up he was to catch it and set the brakes to prevent it from running too far (fols. 105-107). The car wanted was four or five deep in a string and had to be shoved out and then staked back (fols. 331-333); as the car in this operation passed petitioner he caught it by the hand-hold, stepped on one end, climbed up and set the brakes and stopped the car (fols. 106-108), and then returned to the ground. The engine was then brought back and coupled to the car, other brakeman making the coupling. The engine and this car were then backed up far enough to get on another track, petitioner mounting

the engine and riding on the right side looking towards the front (fols. 113-116). The engine and car proceeded to a point to allow the car to be backed into the track where the train was, when he got off a few feet beyond a switch and stopped the engine by signal with his lamp. Petitioner was then obliged to step across the track and close the switch in order to permit the car and engine to back up on the train on the proper track (R., 31).

After seeing the points clear, petitioner stepped back to the position from which he came, as the instructions are to work on the engineer's side when possible (fols. 125-128). He then gave the engineer a signal with his lamp to back, and as the train started he attempted in the dark to board the car in controversy on the front end coming toward him on the engineer's side and in doing so put up his right foot and right hand in the attempt, expecting to find a hand hold or grab iron and sill step, but as the car at that end was not provided with them he fell, his right foot being caught and crushed through the arch. Blood poisoning having set in, the leg had to be amputated two or three times so that it is now off five or six inches above the ankle (fols. 145-150).

This particular car upon which the accident occurred had a ladder with hand holds or grab irons and sill steps on the two diagonal opposite sides near the ends and none on the other two ends (fols. 553-556). While petitioner had his lantern in one hand during this operation, the testimony is that as the car approached, had he raised his lantern to the height of his face, and then dropped it to his knees, and then raised it, which would have been necessary had he attempted to ascertain whether these protective apparatus were located on the end of the car which he sought to mount, it would have been a "go ahead" signal to the engineer (fols. 561, 562).

The record also discloses the fact that outside of a few odd cars on certain other roads, one rarely sees a car of any

system that is not equipped on all four corners with grab irons or hand holds and sill steps and that has been so for five to seven years (fols. 567-572).

The petitioner had never, while in service as a brakeman, observed in use or being hauled on the Pennsylvania R. R., cars which were not equipped on all four corners and on each side with hand holds, ladders and steps, nor had he been instructed or warned that cars without these protective devices would be used on trains he would be required to board (fols. 155-159).

This particular car was built in 1897 (fol. 408). The wheels had to be renewed approximately every 2½ to 3 years, but this did not necessarily require the car to be sent to the shop for that purpose (fols. 432-434). This car had, however, been in shop about nineteen times for repairs including 1911; it had been there twice in May, 1912; twice in July, 1912; again in September and October, 1913; also July, 1914, these being some of the dates only (fol. 445). Fourteen record slips showing repairs from 1912 to November, 1914, were offered in evidence (fols. 500-506). The superintendent of the car shops testified that his records showed one pair of wheels changed on September 17, 1913, and that this as well as the other repairs to parts that were worn out are "regular repairs" (fols. 503-504).

A car did not have to be "shopped" to put on "hand holds" and "sill steps." This could be done on repair track (R., 434, 435).

The Trial Court held that the respondent was not guilty of negligence in failing to provide grab irons, hand holds and sill steps on all four outside corners of the car in accordance with the provision of the Safety Appliance Act and orders of the Interstate Commerce Commission, and directed the jury to bring in a verdict in favor of the respondent and against the petitioner. In so doing the Court took the position that paragraph "F" of the order of the Interstate Commerce Commission of March 13, 1911

(fols. 615-619), extended the time in which the carrier was obliged to comply with the provisions of the Safety Appliance Act which extension took it beyond the date of the injury to petitioner. It also declined to submit to the jury respondent's negligence in failing to instruct and warn petitioner of the dangers of his work through the likelihood of being required to handle cars improperly equipped as the one here involved (R., 615 to 627).

On appeal, the Circuit Court of Appeals affirmed the decision of the Trial Court, though on the question of whether the respondent owed the plaintiff the duty to inform him that some of the cars were provided with these grab irons. and steps on all four corners and others on only two corners, was apparently divided, as the judge writing the opinion expressed the view that as to new men such as petitioner, the parties did not stand upon equality of knowledge and it was a question whether the respondent would be justified in assuming that the exceptional equipment, in the existence of these grab irons and steps on two corners only had in less than two months come to the petitioner's attention or that he would not be misled by the much greater proportion of modern cars. The other two judges according to the opinion took the position that the old style car was equally open to petitioner's observation and respondent had the right to assume that "he would not act without looking, or if he had got so far as to establish instinctive habits, that he would have already learned that he could not rely upon a safe support. In any case, they think, he can not be excused from contributory negligence, which, the case in this aspect being at common law, is a defense."

This case therefore presents three distinct propositions of law, each of which is of vital importance to a proper interpretation of the Safety Appliance Acts throughout the country in order that there may be uniformity of decision in the various Circuit Courts of Appeal, and upon

which it does not appear that this Court has heretofore directly passed.

POINTS RAISED BY THIS PETITION.

I.

The car upon which the accident occurred was provided with hand holds and sill steps at its diagonal opposite corners. Petitioner contended below that under the Safety Appliance Act of 1893, as amended, respondent's car should have been provided with grab irons or hand holds at each of the four outside corners and the failure so to provide constituted negligence, but the Court refused so to hold.

Section 4 of the Act of March 2, 1893 (27 St. L., 531), provides as follows:

> "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars."

By the amendatory Act of March 2, 1903 (32 St. L., 943), the original statute was extended so as to include tenders and locomotives and in part is as follows:

> "shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in in-

terstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of Section 6 of said Act of March 2, 1893, eighteen hundred and ninety-three, as amended by the Act of April 1, 1896, or which are used upon street railways" (32 Stat. L. 943).

The exception in Section 6 referred to above related to four wheel cars or trains composed of eight wheel standard logging cars and is not relevant to the case under consideration.

Section 3 of the Act just cited provides among other things "that nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities or requirements of said Act of March 2, 1893, as amended by the Act of April 1, 1896."

Under this statute petitioner contended that it was the duty of the carrier to provide hand holds or grab irons on each of the four outside corners of the car and the failure of the carrier so to provide constituted negligence, but the Trial Court refused to so hold (fol. 616).

The Act of 1893 was designed for the safety of employees and specifies "grab irons or hand holds in the ends and sides of each car" as one of the requirements. It is true that it does not specify the number as one at each of the four outside corners of the car, still it is obvious that this number was intended. If this were not true the carrier would be equally relieved if the car had only one of its corners so provided. Certainly Congress had no such thought in mind when enacting the law, for it must be presumed that they well knew that in mounting a car the

brakeman is obliged to seek the most convenient corner and often has no opportunity to make an election.

While the Act of 1893 as amended does not specify the number of hand holds, in interpreting that act as it was required to do by Section 3 of the Act of April 14, 1910, (36 Stat. L., 298), the Interstate Commerce Commission under date of March 13, 1911, by formal order specifies that a car to be properly equipped shall have four side hand holds and definitely located them at the four outside corners of the car.

The standard thus fixed by the Interstate Commerce Commission, we submit, is in effect an interpretation of the Safety Appliance Act of 1893, and that therefore the Trial Court as well as the Court of Appeals erred in holding that two hand holds at the diagonal opposite corners of the car were in compliance with the Statute. If four hand holds and four sill steps were necessary to the safety of the employees in 1911, it was equally true that they were necessary for the safety of such employees prior to that date and it was for that reason that the Safety Appliance Act was enacted into law.

Section 2 of the amendment of 1910 (36 Stat. L. 298), provides that:

> "All cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the top of such ladders."

This Court in the case of *Texas P. R. Co. vs. Rigsby,* 241 U. S., 33, 37, held that Section 2 of said Act was in full force and effect as of September 4, 1912. The same position was taken in the case of *Illinois Central R. Co. vs. Williams,* 242 U. S., 462.

In the case of the *St. Louis and Great Island Ry. Co. vs. Moore* (243 U. S., 311, 315), this Court said:

> "This grab iron requirement first appears in the Act of 1893, and the amendment ten years later (March 2, 1903), 32 Stat. at L. 943, Chap. 976, Comp. Stat. 1913, Sec. 8613, making the requirement in terms applicable to tenders, did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for hand holds or grab irons, we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired, it is to be found in the fact that, in the order of Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910 (Stat. at L. 298, Chap. 160, Comp. Stat. 1913, Sec. 8617), two rear end hand holds are required on locomotives, 'one near each side on rear end of tender on the face of the end sill.'"

> "It is not admissible to allow such an impor statutory requirement to be satisfied by equiva or by anything less than literal compliance with it prescribes."

The order of the Interstate Commerce Commission referred to by this Court is the one which also standardizes the requirements with reference to four hand holds or grab irons and sill steps at each of the four outside corners of the cars.

The fallacy of the position taken by the Court of Appeals lies in the fact that it held that the requirements of the Safety Appliance Act were fully met so long as the car

had two hand holds and sill steps at two of the diagonal corners, and that no duty rested upon the carrier to add to these appliances by placing hand holds or grab irons and sill steps on the other two diagonal corners, they holding that so long as this car was in service at the time of the issuance by the Interstate Commerce Commission of the extension order for a period of five years, that the carrier was not required to put on additional equipment within the time of that extension. The Court of Appeals treated the order of the Interstate Commerce Commission standardizing equipment and fixing their location as in effect a new law abridging the existing statute. The petitioner's contention was and is that the Act of 1893 required hand holds or grab irons and sill steps at all corners of the car where the work of the men required their use, and that Section 3 of the Act of 1910 merely gave the Interstate Commerce Commission jurisdiction to standardize the equipment, and that the statute did not give them power to suspend the operation and requirements of the statute that every car in service be equipped with hand holds or grab irons and sill steps wherever the necessity of the work required their use for the safety of employees. The Interstate Commerce Commission under Section 3 of the Act of 1910 had merely the power to designate the location and size and to standardize such equipment as the statute had provided. The order of the Commission fixing the number of and location is merely an interpretation by that body of what were the requirements of the statute. The Commission, however, was given the power to allow a carrier an extension of five years to use cars equipped according to these requirements although the location and size was different from that which they had prescribed by their order of March 13, 1911.

That we are correct in asserting that the Court of Appeals erred in holding that the Act of 1893, as amended by the Act of 1910 was not in full force as to this car at the time of the accident, we think is clearly indicated by the decision of this Court in the case of *Illinois Central R.*

Co. vs. Williams, 242 U. S., 462. In that case Mr. Justice Clark, in an able opinion, fully considers the question and we think sustains the contention here made.

The petitioner contends that the decision of the Circuit Court of Appeals in this case, holding that the extension order of the Interstate Commerce Commission amounted to a suspension of the provisions of the Safety Appliance Act, is in conflict with the decisions of the United States Courts construing said act.

U. S. vs. B. & O. Ry., 184 Fed., 94.
U. S. vs. Norfolk & W. Ry. Co., 184 Fed., 99.
U. S. vs. C. of Ga. Ry. Co., 157 Fed., 893.

The ruling of the Circuit Court of Appeals in this case in effect holds that as long as the car had no hand holds and sill steps on two corners at the time of the promulgation of the extension order, that the carrier would not be required to put them on within the five year limit. If we assume that the car had no grab irons or sill steps whatever, we cannot see why this decision would not allow its use and operation during said five years.

Had there been a sill step and grab iron at this point where Delahunt and the petitioner attempted to board this car on this night and the same had been removed before they attempted to use it, then the respondent would be liable; but the Circuit Court has held in this case, because they were not on at all, the extension order relieved the respondent from putting them on during the five years.

II

Petitioner contends that irrespective of the foregoing provisions of the Act of 1893, as amended, that the following provision in the orders and rules of the Interstate Commerce Commission promulgated on March 13, 1911,

pursuant to the provisions of law, specifically require that each car be provided with four sill steps and four hand holds. The orders with reference to the location of the sill steps provides as follows: "One near each end on each side of car, so that there shall be not more than eighteen inches from end of car to center of tread of sill step * * * tread shall be not more than twenty-four, preferably not more than twenty-two, inches above the top of rail." The provision with reference to the location of the four side hand holds is as follows: "Horizontal; one near each end of each side of car; said hand holds shall be not less than twenty-four nor more than thirty inches above center line of coupler, except as provided above, where tread of ladder is a hand hold. Clearance of outer end of hand hold shall be not more than one foot."

Petitioner contended in the Trial Court that this distinctly standardized the safety appliances required on all cars, but the Trial Court at the instance of the defendant below held that it was untenable inasmuch as subdivision "F" of the said order of the Interstate Commerce Commission of March 13, 1911, extended the period for complying with the provisions as to hand holds and sill steps for five years or to a date beyond that on which the accident occurred, with which position the Court of Appeals agreed.

In considering this subdivision it is necessary that subdivisions "F" and "G" be referred to. They are as follows:

> (f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to hand holds, running boards, ladders, sill

steps and brake staffs, *provided*, that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of hand holds (except end hand holds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order (Transcript, fols. 463-464, defendant's Exhibit No. 9).

A complete answer to the position taken by the lower Court we submit is found in subdivision "G."

Subdivision "F" provides that "When a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to standards prescribed in said order in respect to hand holds, running boards, ladders, sill steps and brake staffs."

Subdivision "F" is qualified, however, by subdivision "G." It will be observed that the latter provides that "carriers are not required to change the location of hand holds (except end hand holds under end sills) ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo *regular repairs* they must then be made to comply with the standards prescribed in said order."

It was shown at the trial that this car did undergo *regular repairs* on numerous occasions and notwithstanding that fact, grab irons or hand holds and sill steps were not placed on all four corners as required. The evidence shows that the car had been in shop for repairs nineteen times

including 1911; twice in May and twice in July, 1912, in September and October, 1913, and July, 1914, which are some of the dates only. It was shown from the General Superintendent of the line owning this car that one pair of wheels was changed on September 17, 1913 (fols. 500-503), and that the repairs referred to were *regular repairs* as distinguished from rebuilding (fols. 503-504).

Since therefore this car underwent "regular repairs" as specified in subdivision "G" referred to, it was the duty of the carrier to comply with the provisions of the Interstate Commerce Commission by installing the four sill steps and four side hand holds at each of the outside corners of the car, notwithstanding the five year extension authorized in subdivision "F," and that the failure so to do constituted negligence on the part of the carrier. Both the Trial Court as well as the Court of Appeals held that notwithstanding subdivisions "F" and "G" that the duty of the carrier to install these appliances had not attached because of the five year extension and that therefore there was no negligence on the part of the carrier in its failure so to do.

III

Petitioner contends that the defendant owed him the duty of advising or informing him that some of the cars with reference to which he would be required to operate had grab irons or hand holds on only two corners, while others had them on all four. Both the Trial Court and the Court of Appeals held however that the respondent owed petitioner no duty in that regard.

The evidence showed that every car, handled, ridden or observed by petitioner in his short experience in this work was supplied with hand holds or grab irons on all four outside corners of the car and that other cars belonging to the Fruit Growers Express, of which this was one, were so equipped. The accident happened at night and it was

shown that had he raised his lantern used for signaling purposes and then lowered it for the purpose of ascertaining whether these appliances were located at the point at which he attempted to board the car, it would have been equivalent to a signal to the engineer to "go ahead" (fols. 561, 562). It was shown that these men board and drop off these cars more by instinct and practice than actual observation. It is because of this fact that the law requires this equipment at uniform and fixed places, and in subdivision "G" of the orders promulgated by the Commission direct that if they are located at a greater distance than three inches of the required location, they must be made to comply with the standards. As stated by this Court in the case of *Illinois C. R. Co. vs. Williams*, 242 U. S., 462, 466:

> "That they shall be standardized, shall be of uniform size and character, and, so far as ladders and hand holds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their injury or death when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service."

> "It is for such emergencies that these safety appliances are provided—for service in those instant decisions upon which the safety of life or limb of a man so often depends in this perilous employment—and therefore this law requires that ultimately the location of these ladders and hand holds shall be absolutely fixed, so that the employee will know certainly that night or day he will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come."

The opinion of the Circuit Court of Appeals upon this point discloses a difference of opinion on the part of the Judges in this regard. The Judge writing the opinion in reference to "green men" of which the petitioner was one, having had only about two months' experience, expresses doubt whether the Court should assume that they would necessarily observe such relatively exceptional equipment as existed in the case at bar. He adds "it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits, that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense."

Petitioner had the undoubted right to rely upon the assumption that he would not be required to work upon or about any car not properly equipped in accordance with the provision of law, and when required so to do, it was an additional hazard as to which he should have been advised.

In conclusion it is respectfully submitted that the questions here involved are of general importance and should be definitely settled by this Court in order that there may be uniformity of decision in the various Circuit Courts of Appeal throughout the country.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of all of the proceedings in a certain cause in said Circuit Court of Appeals lately pending, wherein your petitioner was plaintiff-in-error and the Pennsylvania Railroad Company was defendant-in-error, being cause No. 113, October term, 1917, on the docket of said Court, and to that end petitioner now herewith tenders his petition, with a certified copy of the entire record in said cause, in said Court of Appeals.

THOMAS A. SULLIVAN,

EDWIN C. BRANDENBURG,

Counsel for Petitioner.

SULLIVAN, BAGLEY & WECHTER,

Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1918

MICHAEL U. BOEHMER,
Petitioner,

AGAINST

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

No.....

The respondents are hereby notified that the petitioner will, on Monday, the 7th day of October, A. D. 1918, at the opening of court, or as soon thereafter as counsel can be heard, submit the foregoing petition and brief to the Supreme Court of the United States, in its Court Room, at the Capitol, in the City of Washington, District of Columbia; a copy of which petition for a writ of certiorari and brief thereon are herewith delivered to you.

THOMAS A. SULLIVAN,
EDWIN C. BRANDENBURG,
Counsel for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of certiorari and brief thereon mentioned therein are hereby acknowledged this 1st day of August, A. D. 1918.

Ramsey & Adams

Counsel for Respondent.

NO. 191.

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1919.

MICHAEL U. BOEHMER,
Petitioner,
against
PENNSYLVANIA RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

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809-812 Chamber of Commerce,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

CASES CITED.

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BRIEF OF PETITIONER.

STATEMENT OF CASE.

This cause comes before this court on a writ of certiorari granted upon the application of the petitioner, on October 31, 1918, directed to the United States Circuit Court of Appeals for the Second Circuit, to review the judgment and decision of said Circuit Court of Appeals (Record, pages 169, 170, 171, 172) affirming a judgment and order denying a new trial of the United States District Court for the

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Western District of New York, entered upon a direction of a verdict by said District Court of "no cause of action" at close of a trial before court and jury (Record, Fols. 624-626). The judgment was entered April 5, 1917, (Fols. 39, 44). The order denying the plaintiff's (petitioner here) motion for a new trial (Record, Fols. 624-627) was entered March 28, 1917, (Record, Fols. 45-48), (Writ, Record, page 179).

The action was commenced January 22, 1916, to recover damages for personal injuries sustained by the plaintiff (hereinafter called the petitioner) in the defendant's (hereinafter called the carrier) interchange yard in the Village of Brocton, New York, on the eighth day of November, 1915.

PLEADINGS AND ISSUES.

The complaint alleges that the carrier was engaged in interstate commerce and that the petitioner was at the time in its employ as a brakeman on a train engaged in such interstate commerce, and that while so employed he sustained injuries, which necessitated the amputation of his right leg, through the negligence of the carrier in the following respects:

FIRST: That the defendant was negligent in handling a car without grab irons, handholds and sill steps on all outside four corners, in accordance with the provisions of the Safety Appliance Act and the orders of the Interstate Commerce Commission (Fols. 10-12).

SECOND: That the defendant was negligent in failing to instruct and warn the plaintiff that he would be required to board and work around and upon cars not equipped with grab irons, handholds and sill steps on all four

outside corners, and of the dangers in connection therewith, a fact which was known to the defendant, but which was unknown to the plaintiff (Complaint, Fol. 13).

The defendant's answer is in the nature of a general denial, as to its negligence, (Fol. 23), and for a second defense pleads assumption of risk by plaintiff. (Fols. 23-24). The answer, however, admits the incorporation of the defendant and that it was engaged in interstate commerce. (Answer, Fols. 20-21). It also admits that plaintiff was in its employ in such interstate commerce at the time he was injured. (Answer, Fol. 22).

The Trial Court directed a verdict of no cause of action solely upon the view taken by Trial Court of the effect of paragraph (f) of the Interstate Commerce Commission Order of March 13, 1911. (Transcript of Record, Fols. 615 to 619).

The court adopted the view that such paragraph extended the time in which the carrier was obliged to comply with the provisions of the Safety Appliance Acts beyond the date of the injury to the plaintiff.

The court also refused the plaintiff's motions and request to go to the jury upon the negligence of defendant in failing to instruct and warn the plaintiff of the dangers of his work. (Transcript of Record, Fols. 609-627).

Due exceptions were taken to these various rulings, (Transcript of Record, Fols 619 to 627) and they are the basis of assignment of errors Nos. 2 to 8 inclusive. (Transcript of Record, Fols. 638 to 644).

The United States Circuit Court of Appeals, Second Circuit, affirmed the above stated rulings of the Trial

Court. The opinion and decision being found in the Record at pages 169 to 172.

This court granted the petitioner's application for a writ of certiorari to review such decision and judgment of affirmance. (Record, page 179).

QUESTIONS PRESENTED IN THIS COURT.

The case presents three distinct propositions of law, each of which is of vital importance to a proper interpretation of the Safety Appliance Acts throughout the country, in order that there may be uniformity of decisions in the various Circuit Courts of Appeal, and upon which it does not appear that this court has heretofore directly passed. The Trial Court held:

FIRST: That the Safety Appliance Acts does not require handholds, grab irons and sill steps on each of the four outside corners of each box car hauled in interstate commerce.

SECOND: That the provisions of the Safety Appliance Acts were suspended as to the car in question by the order of the Interstate Commerce Commission of March 13, 1911.

THIRD: That the carrier did not owe any duty to the petitioner to advise and inform him that some of the cars on which he would be required to work had grab irons, handholds and sill steps on only two corners, while most of the cars had such appliances on all four corners.

These rulings were sustained by the Circuit Court of Appeals and constitute the errors presented to this court.

STATEMENT OF FACTS.

The plaintiff, Michael U. Boehmer, a man of 32 years of age became an employee of the defendant in the Signal Department some time in 1914 or 1915, as a carpenter. He then resided in Corry, Pa. (Transcript of Record, Fols. 78-81). As such he went over the railroad's system in a car where the men lived, but he had nothing to do with trains or cars; no switching, breaking, coupling or uncoupling. (Boehmer, Fols. 81-82).

Some time in September, 1915, he hired out, through Mr. Rupert, as a brakeman and at first worked out of Corry, Pa. After making his student trip which consisted of one complete round trip over the entire system on this division, over main line and over what we call the "creek," Buffalo to Emporium, and return, and Buffalo to Oil City and return, to Mayville and Erie. (Transcript of Record, Fols. 83-86), he then went working on the so-called "Corry turn job," that is taking an engine and caboose out of Corry, Pa., and pick up all the empties and take them to Oil City; get a train and bring it back to Corry, and set off to Titusville occasionally. In doing this work he was required to couple and uncouple cars and to board them. (Transcript of Record, Fols. 86-87).

His first regular trip on a train to Buffalo was on the occasion he was injured. There was no difference in the character of the work on that trip. (Transcript of Record, Fols. 88-89). He had boarded cars with his hands and feet. (Transcript of Record, Fol. 89). On the night he was injured they were ordered out of Oil City about 6:50 p. m. The crew were brakeman Delahunt and plaintiff, conductor William Idle, flagman William G. Pickard, engineer Hipwell and fireman unknown to plaintiff. (Tran-

script of Record, Fols. 90-91). Train made stop at Corry, where some cars were set out. (Transcript of Record, Fols. 91-92). Information came to stop at Brocton at P. S. or Kr. block station, where the company has operators employed to control the trains going in both directions. Orders to take sidings or to proceed, or any caution the company may deem fit are received from these stations. The initials stated are the code for these stations used in telegraphing from one to another. (Transcript of Record, Fols. 93-95). The message received read "Pick up grapes at Brocton." This message was received somewhere southwest of Brocton and after receipt the train proceeded to Brocton (Transcript of Record, Fols. 95-97). When train arrived at Brocton we stopped before we got to the switch, opened the switch and pulled in on the siding. The one next to the main track marked on the map "Passing siding #1 Track." We did not go in far enough to clear the points, some of train was out on the main track. The other brakeman cut off the engine and they went to get coal and water. Came back, coupled on and pulled into siding so as to clear points. (Transcript of Record, Fols. 97-99). The plaintiff was at the front end with the engine. The engine was cut off and pulled down near a switch and we were instructed by the conductor to go over on the Nickel Plate track which was kept clear for five minutes for us. The engine was backing up at the time and went until beyond the switch points which would permit going onto the traffic track. (Transcript of Record, Fols. 101-104 Delahunt, Fols. 325-331). Then plaintiff got off the engine. He was told to stay there and when Delahunt shoved the car by he was to catch the car and set the brake on it so it would not run too far. Plaintiff does not know how car was got out but it came out where he was across the switch points. (Transcript of Record, 105-107, Delahunt 325-330). Delahunt says it was "staked" out and described the process. (Transcript of Record, 330-331). The car

wanted was four or five deep in a string and it had to be shifted out and then staked back. (Transcript of Record, Delahunt, Fols. 331-333). That was all done by Delahunt. When he disconnected it and kicked it out onto a track there was nobody on it and Delahunt did not get on it to make the cut, but after he cut it off it seemed to be going too far and Delahunt did not want it to go too far, and chased after the car on its east side, the engineer's side of engine and attempted to get on the southeast corner; reached up to get hold and couldn't get hold of anything and then ran ahead to the other side and climbed on the step. He put his hands against the side of the car where the grab irons should be on the southeast corner. (Transcript of Record, Delahunt, Fols. 334-338). Delahunt had been a freight brakeman for about three and one-half years. (Transcript of Record, Delahunt, Fols. 320-322). After the car had been staken out and as it was passing the plaintiff he got on it by the handle and step on the side toward the lake, climbed up and set brake and stopped car. (Transcript of Record, Boehmer, Fols. 106-108).

If we call the tracks running north and south, and the lake on the west as all the railroad men look at it then I was on the west side of car. (Transcript of Record, Boehmer, Fol. 109).

The sill step did not extend down as far on this car as on some others.

Boehmer shows how he boarded car by putting his hand up to grab iron and foot in sill step, (Transcript of Record, Boehmer, Fol. 111), and said it was the way railroad men board these cars.

That he never observed railroad men take a lantern and look for handholds on car and that he was never instructed to do so. (Transcript of Record, Boehmer, Fol. 112).

After setting brakes Boehmer came to the ground and the other brakeman made the coupling when the engine came back. It was backed up far enough to get on #3 track. Delahunt went back to the cabin and I rode on the tank of the engine. I think on the right side looking toward the front. (Transcript of Record, Boehmer, Fols. 113-116). The engine and car proceeded down to a point which would allow the car to be backed into the track where the train was. The plaintiff then got off a few feet beyond the switch. (Transcript of Record, Boehmer, Fols. 117-120). The plaintiff waited until the car cleared the switch and swung the engineer down; stopped the engine with stop signal given with his railroad lamp. The engine stopped, the car somewhat beyond me and the engine still further. Plaintiff stepped across the track and closed the switch in order to permit the car and engine to back up to the train on #1 siding. (Boehmer, Transcript of Record, page 31. Folios are incorrect on this page). Plaintiff had been riding on the right-hand side of the engine, the engineer's side and when the engine and car stopped he had to cross the track to get to the switch lever and after seeing the points clear he stepped back to the position he came from, as our instructions are to work on the engineer's side wherever possible. (Transcript of Record, Boehmer, Fols. 125-128).

Plaintiff gave the engineer a signal with his lantern to back up. Just then someone came from the tower and ran over to engine probably with orders. Then the engineer started to back up and plaintiff attempted to board the car on the front end coming toward him on the engineer's

side. I stood there and gave the back-up signal, and as the car came to me I put my right foot up and my right hand up and attempted to board the car. I didn't get hold of anything, and I fell backwards on the side of the car very close to the front. (Transcript of Record, Boehmer, Fols. 129-132).

"Q. How high did you raise your foot?

A. About like that (shows).

Q. What was the object of your raising your foot so high?

A. Because I was on the car once before and I knew the step was very high on it.

Q. When you put your hands against the car where was your lantern?

A. In one of my hands; I cannot recall which one. That is the customary way of carrying a lantern.

Q. What happened when your hands struck the side of the car?

A. There was nothing there to get hold of.

Q. Was there any handle, handhold or grab iron there?

A. There was not.

Q. Was there any side step on that car on that side and end?

A. No, sir, there was not. I fell backwards, one of my legs was caught and crushed by the wheel I suppose. I guess I threw my lantern back of me when I fell, fell prone on back. Right foot caught and crushed through the arch. (Transcript of Record, Boehmer, Fols. 133-140, Transcript of Record, Hipwell, engineer, Fols. 539-545). He had some other minor injuries. This happened about 4 o'clock in the morning of November 8th. (Transcript of Record, Fols. 141-144). Plaintiff was taken to a hospital. Blood poisoning set in. The leg has been amputated two

or three times so that it is now off 5 or 6 inches above ankle, (Transcript of Record, Fols. 149-150, Testimony of Dr. William H. Marcy, pp. 88-95)."

This car had ladder with handholds or grab irons and sill steps on two diagonal opposite sides near the ends and none on the other two. (Transcript of Record, Hipwell, Fols. 553-556. Defendant's Exhibits Nos. 12 & 13).

Had Boehmer raised his lantern as the car approached him to about the height of his face and dropped it to his knees and then raised it and the engineer had observed these motions, he would take it as a "go ahead signal." (Transcript of Record, Hipwell, Fols. 561-562). Outside of a few odd cars from the Nickel Plate, a few Grand Trunk, Southern Pacific, occasionally Chicago & North Western, Seaboard and "Monon" lines and some of the refrigerator lines you scarcely ever see a car of any other system that is not equipped on all four corners with grab irons and sill steps and that has been so for last five, six and seven years. (Transcript of Record, Hipwell, Fols. 567 to 572). The railroads have men to inspect these cars at transfer points and to refuse them, and the regular trainmen do not inspect them for handholds and steps. That is done by inspectors in the yards at these transfer points. (Transcript of Record, Defendant's witness Keating, Fols. 482-484).

The plaintiff had never while in service as brakeman observed in use or being hauled on the Pennsylvania Railroad, cars that were not equipped on all four corners on each side, with handholds, ladders and steps.

"Q. Had any instructions been given to you while you were in the service as brakeman that cars without handholds and steps on each side and all four cor

ners would be used in the trains that you were to operate?

A. I did not. I never received any instructions.

Q. Were you ever warned that you would be expected to work in and about cars that were not equipped with handholds and sill steps on the outside, and all four corners of the car?

A. No, sir, I was not." (Transcript of Record, Plaintiff's Fols. 155-159).

Witness Hipwell had noticed cars not equipped with handholds and sill steps being hauled over the Nickel Plate. (Transcript of Record, Fol. 574).

Plaintiff on Re-direct examination, testified as follows:

"Q. Counsel asked you if you tried to climb on a car without a ladder before and you answered, 'no, sir.'

A. Yes, sir.

Q. How came it that you never tried to climb on a car without a ladder or handle before?

A. Because I never came in contact with one of that kind before." (Transcript of Record, Fols. 252-253).

The defendant produced a witness G. F. Laughlin who testified this particular car T. R. E. 32203 was owned by Armour Car Lines (Fol. 406) was built in 1897 (Fol. 408) and that they had no record of its being rebuilt. (Fols. 409-410). That when built it had cast iron wheels which last two and a half to three years and steel wheels longer and that it had cast iron wheels last time he saw it. And that its wheels were renewed approximately every two and half to three years not necessarily sent to a shop to do it, a repair track would do for that work, and that on repair tracks handholds and sill steps could be put on and were

being put on every day. (Laughlin, Fols. 432 to 434). The car had been in shops about 19 times for repairs including 1911; May, 1912; May, 1912; July, 1912; July, 1912; October, 1913; September, 1913; July, 1914. Those were some of the dates. (Laughlin, Fol. 445).

The witness produced a number of slips, fourteen, showing repairs ranging from 1912 down to Nov. 10, 1914. They show one pair of wheels changed Sept. 17, 1913, (Laughlin Fols. 500 to 503).

"Q. The replacing of wheels would be a regular repair to the car?

A. Yes, sir.

Q. All the other items then are regular repairs to the car, the items of work done on this car were regular repairs to it?

A. They were repairs to parts that wore out in regular service and required renewal.

Q. That is what you call regular repair as distinguished from rebuilding?

A. Practically. Yes, sir." (Laughlin Cross Examination, Fols. 503-504).

In addition to referring to the provisions and requirements of the various Safety Appliance acts the plaintiff introduced those portions of the order rules and directions of the Interstate Commerce Commission made March 13th, 1911, relating to sill steps and handholds on cars of the type in question in this cause. Those provisions are as follows:

SILL STEPS:

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half (½) by one and one-half (1½) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12) inches.

Minimum clear depth, eight (8) inches.

Location: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill step. Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Sill steps exceeding twenty-one (21) inches in depth shall have an additional tread. Sill steps shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

SIDE-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths (⅝) of an inch, wrought iron or steel. Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half (2½) inches.

Location: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a

handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivets.

(Transcript, Fols. 380 to 387, Plaintiff's Exhibit #4, pages 173-174-175).

The defendant offered in evidence an order of Interstate Commerce Commission dated March 13, 1911, which contains these two paragraphs:

"(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs, *provided,* that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896 and March 2, 1903.

"(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said or-

der." (Transcript, Fols. 463-464, Defendant's Exhibit #9, pages 176-177).

The other portions of the acts of the Interstate Commerce Commission were also put in evidence but do not seem to us to bear upon the question involved.

STATUTORY PROVISIONS.

On March 2, 1893, the Congress of the United States enacted the first "Safety Appliance Law," entitled: "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes."

The provisions of that act which are applicable to the facts of this case are as follows:

> "*Section 4.* That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."
>
> 27 Stat. L., 531.
>
> "*Section 8.* That any employee of any such common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."
>
> 27 Stat. L., 532.

The Act of 1893 as amended by the Act of 1896 was further amended by an act passed March 2, 1903, which provides that the provisions and requirements of the act approved March 2, 1893, and amended April 1, 1896,

> "shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of Section 6 of said Act of March 2, 1893, eighteen hundred and ninety-three, as amended by the Act of April 1, 1896, or which are used upon street railways."

(The exception in Section 6 referred to above applies to four wheeled cars or to trains composed of eight wheel standard logging cars).

> "*Section 3.* That the provisions of this act (March 2, 1903) shall not take effect until September 1, 1903. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities or requirements of said act of March 2, 1893, as amended by the act of April 1, 1896; and all the provisions, powers, duties, requirements and liabilities of said act of March 2, 1893, as amended by the act of April 1, 1896, shall, except as specifically amended by this act, apply to this act."

By public Act No. 133 approved April 14, 1910, (36 Stat. L., 1397).

AN ACT to supplement "An act to promote the safety of employees *et cetera,*" was enacted by Congress which provides:

Section 1. "That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, commonly known as the 'Safety Appliance Acts.'"

Section 2. "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders:

PROVIDED, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purposes."

Section 3. "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this act and section four of the Act of March, second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem

proper, and thereafter said number, location, dimensions and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown, and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act:

PROVIDED, that the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard prescribed by the commission."

Congress also, on April 5, 1910, enacted a law entitled:

"An act relating to the liability of common carriers by railroads to their employees in certain cases."

Section 1 provides:

"That every common carrier by railroad, while engaged in commerce between any of the several states

or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * * * resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 3. "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee * * * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

ARGUMENT.

POINT I.

THE SAFETY APPLIANCE ACTS REQUIRE SECURE HANDHOLDS, GRAB IRONS AND SILL STEPS AT ALL FOUR CORNERS ON THE OUTSIDE.

The provisions of the law must be given a reasonable interpretation and should be construed to mean that these appliances must be at the points and places where the exigencies of the work require them for the protection and safety of the employees.

The car upon which the accident occurred was provided with handholds and sill steps at its diagonal opposite corners. Petitioner contended below that under the Safety Appliance Act of 1893, as amended, respondent's car should have been provided with grab irons or handholds and sill steps at each of the four outside corners and the failure so to provide constituted negligence, but the court refused so to hold.

Section 4 of the Act of March 2, 1893, (27 St. L., 531), provides as follows:

> "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars."

By the amendatory Act of March 2, 1903, (32 St. L., 943), the original statute was extended so as to include tenders and locomotives and in part is as follows:

> "Shall be held to apply to common carriers by rail-

roads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of Section 6 of said Act of March 2, 1893, eighteen hundred and ninety-three, as amended by the Act of April 1, 1896, or which are used upon street railways" (32 Stat. L. 943).

The exception in Section 6 referred to above related to four wheel cars or trains composed of eight wheel standard logging cars and is not relevant to the case under consideration.

Section 3 of the Act just cited provides among other things "that nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities or requirements of said Act of March 2, 1893, as amended by the Act of April 1, 1896."

Under this statute petitioner contended that it was the duty of the carrier to provide handholds or grab irons on each of the four outside corners of the car and the failure of the carrier so to provide constituted negligence, but the Trial Court refused to so hold (Fol. 616).

The Act of 1893 was designed for the safety of employees and specifies "grab irons or handholds in the ends and sides of each car" as one of the requirements. It is true that it does not specify the number as one at each of the four outside corners of the car, still it is obvious that this number was intended. If this were not true the carrier would be equally relieved if the car had only one of its corners so provided. Certainly Congress had no such thought in mind when enacting the law, for it must be presumed that they well knew that in mounting a car the brakeman is obliged to seek the most convenient corner and often as in this case where he can be seen by the engineer so that his signals will be effective and where he can judge the distance from the train as the car approaches it. He has no opportunity to make an election.

While the Act of 1893 as amended does not specify the number of handholds, in interpreting that act as it was required to do by Section 3 of the Act of April 14, 1910, (36 Stat. L., 298), the Interstate Commerce Commission under date of March 13, 1911, by formal order specifies that a car to be properly equipped shall have four side handholds and still steps and definitely located them at the four outside corners of the car.

The standard thus fixed by the Interstate Commerce Commission, we submit, is in effect an interpretation of the Safety Appliance Act of 1893, and that therefore the Trial Court as well as the Court of Appeals erred in holding that two handholds at the diagonal opposite corners of the car were a compliance with the Statute. If four handholds and four sill steps were necessary to the safety of the employees in 1911, it was equally true that they were necessary for the safety of such employees prior to that date and it was for that reason that the Safety Appliance Act was enacted into law.

Section 2 of the amendment of 1910 (36 Stat. L. 298), provides that:

> "All cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders."

This court in the case of *Texas P. R. Co. vs. Rigsby,* 241 U. S., 33, 37, held that Section 2 of said Act was in full force and effect as of September 4, 1912. The same position was taken in the case of *Illinois Central R. Co. vs. Williams,* 242 U. S., 462.

In the case of the *St. Joseph and Great Island Ry. Co. vs. Moore,* (243 U. S., 311, 315), this court said:

> "This grab iron requirement first appears in the Act of 1893, and the amendment ten years later (March 2, 1903), 32 Stat. at L. 943, Chap. 976, Comp. Stat. 1913, Sec. 8613, making the requirement in terms applicable to tenders, did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for handholds or grab irons, we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired, it is to be found in the fact that, in the order of Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910, (Stat. at L. 298, Chap. 160, Comp. Stat. 1913,

Sec. 8617), two rear end handholds are required on locomotives, 'one near each side on rear end of tender on the face of the end sill.' "

"It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes."

The order of the Interstate Commerce Commission referred to by this court is the one which also standardizes the requirements with reference to four handholds or grab irons and sill steps at each of the four outside corners of the cars.

The fallacy of the position taken by the Court of Appeals lies in the fact that it held that the requirements of the Safety Appliance Act were fully met so long as the car had two handholds and sill steps at two of the diagonal corners, and that no duty rested upon the carrier to add to these appliances by placing handholds or grab irons and sill steps on the other two diagonal corners, they holding that so long as this car was in service at the time of the issuance by the Interstate Commerce Commission of the extension order for a period of five years, that the carrier was not required to put on additional equipment within the time of that extension. The Court of Appeals treated the order of the Interstate Commerce Commission standardizing equipment and fixing their location as in effect a new law abridging the existing statute. The petitioner's contention was and is that the Act of 1893 required handholds or grab irons at all corners of the car where the work of the men required their use, and that Section 3 of the Act of 1910 merely gave the Interstate Commerce Commission jurisdiction to standardize the equipment, and that the statute did not give them power to suspend the

operation and requirements of the statute that every car in service be equipped with handholds or grab irons and sill steps wherever the necessity of the work required their use for the safety of employees. The Interstate Commerce Commission under Section 3 of the Act of 1910 had merely the power to designate the location and size and to standardize such equipment as the statute had provided. The order of the Commission fixing the number of and location is merely an interpretation by that body of what were the requirements of the statute. The Commission, however, was given the power to allow a carrier an extension of five years to use cars equipped according to these requirements although the location and size was different from that which they had prescribed by their order of March 13, 1911.

That we are correct in asserting that the Court of Appeals erred in holding that the Act of 1893, as amended by the Act of 1910 was not in full force as to this car at the time of the accident, we think is clearly indicated by the decision of this court in the case of *Illinois Central R. Co. vs. Williams*, 242 U. S., 462. In that case Mr. Justice Clark, in an able opinion, fully considers the question and we think sustains the contention here made.

The petitioner contends that the decision of the Circuit Court of Appeals in this case, holding that handholds, grab irons and sill steps on two corners of the car, a compliance with the provisions of the Safety Appliance Act, is in conflict with the decisions of the United States Courts construing said act.

U. S. vs. B. & O. Ry., 184 Fed., 94.
U. S. vs. Norfolk & W. Ry. Co., 184 Fed., 99.
U. S. vs. C. of Ga. Ry. Co., 157 Fed., 893.

We can conceive of no set of facts that better illustrates the necessity of these handholds and sill steps at all four corners on the outside than the facts in this case.

In this switching operation and at the immediate time of the accident, the plaintiff was required to take a conspicuous position on the front of the leading car and to be on the engineer's side, who had control of the movement of the engine and car as it was being backed toward the train, to which it was to be coupled. (Fols. 312-313, Rule 102). He could not get in a conspicuous place where he could be seen by the engineer and be at the foremost end, unless there was a grab iron, handhold and sill step on the outside corner for him to ride upon. That there was a ladder on that side of the car next the engine would be of no avail under such circumstances, because had the plaintiff got on such ladder, it would have been impossible for him to judge, in the darkness, when the car had approached the end of the train sufficiently near for him to signal down the engineer; then run forward to be in a position to make the coupling. When we consider that this exact operation is performed probably hundreds of thousands of times every day in railroad operations throughout the United States, one can realize how absolutely essential and necessary are grab irons, handholds and sill steps on all four outside corners of cars, and we urge that the statute in and of itself intended these appliances should be at every point on the car where the danger and necessity of the service require them. That under the decisions construing the statute it has not been left to the judgment of railroad companies to determine what was and was not a compliance. In every case that we have been able to find the courts have uniformly construed the statute as in full operation and to require these appliances at all points and at each end where it appears the service requires it or danger to employes was obviated.

Delahunt, a brakeman of three and one-half years' experience had attempted to board this very car at the identical corner where Boehmer was injured only five minutes before such injury. (Transcript of Record, Delahunt, Fols. 334-338).

He wanted to get on the car to stop it after it had been "staked" out and under the kick was apparently running too far. He put his hands against the car at the place where a grab iron should have been and finding none he was obliged to run to other side and after the car to get on it.

Fortunately it stopped on this occasion, but suppose the car had been running too fast for Delahunt to run around the end and catch it and had crashed into other cars on which were men working on the assumption that Delahunt had boarded and stopped it? Suppose it was running on a down grade under such circumstances? Supposing a man was fixing a coupling on a car to which it was to be coupled and was relying upon Delahunt to "get it" and check its speed?

These are only a few of the reasons why handholds, grab irons and sill steps were required by the Safety Appliance Acts and why they were required on the sides on all four corners.

The Safety Appliance Acts are remedial statutes and must be construed so as to accomplish the intent of Congress.

Johnson vs. Southern Pacific Company, 196 U. S. 1.

They impose an absolute and unqualified duty on carriers engaged in interstate commerce to equip all cars with the appliances provided by the statute, and to maintain the same in a secure condition.

Texas and P. R. Co. vs. Rigsby, 241 U. S. 33;
St. Louis J. M. & S. R. Co. vs. Taylor, 210 U. S. 218;

Chicago B. & L. R. Co. vs. U. S., 220 U. S., 559;
Delk vs. St. Louis & S. F. R. Co., 220 U. S., 580;
U. S. vs. Pere Marquette Ry. Co., 211 F. 220.

The statutes are not satisfied by equivalents or anything less than literal compliance with what is prescribed. A pin lifter or uncoupling lever extending across the tender just above the coupler cannot be held in effect a substitute for the grab irons and handholds required by the statute.

St. Joseph & Grand Island Ry. Co. vs. Moore, 37 Sup. Court Rep., 278.

Providing an automatic coupler which could be operated from one side of a car is not a compliance if an employee would have to go between the cars to make coupling if at the other side thereof.

U. S. vs. Central of Georgia Ry. Co., 157 Fed. 893.

These handholds and grab irons must be on all corners of the car. We so interpret the decisions in the cases of U. S. vs. Baltimore & O. R. Co., 184 Fed. 94 and U. S. vs. Norfolk & W. Ry. Co., 184 Fed. 99.

Any variation from the customary and usual location and style of handhold, grab iron or sill step, or in the placing of the lights may lead to injury to the employee.

Erie R. Co. vs. Schleenbaker, 257 Fed. 667.

We respectfully urge that it was error to hold that ladders, handholds, grab irons and sill steps were not required by the Safety Appliance Acts to be on all four corners of this car.

POINT II.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION OF MARCH 13, 1911, REQUIRES HANDHOLDS, GRAB IRONS AND SILL STEPS AT ALL FOUR OUTSIDE CORNERS OF A CAR. PARAGRAPH (F) OF SUCH ORDER DID NOT EXTEND THE TIME IN WHICH SUCH APPLIANCES WERE TO BE PROVIDED BUT MERELY EXTENDED THE TIME IN WHICH THE APPLIANCES WERE TO BE STANDARDIZED.

Illinois Central vs. Williams, 242, U. S., 462.

Petitioner contends that the following provision in the orders and rules of the Interstate Commerce Commission promulgated on March 13, 1911, pursuant to the provisions of law, specifically require that each car be provided with four sill steps and four handholds. The orders with reference to the location of the sill steps provides as follows: "One near each end on each side of car, so that there shall be not more than eighteen inches from end of car to center of tread of sill step * * * tread shall be not more than twenty-four, preferably not more than twenty-two, inches above the top of rail." The provision with reference to the location of the four side handholds is as follows: "Horizontal; one near each end of each side of car; said handholds shall be not less than twenty-four nor more than thirty inches above center line of coupler, except as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than one foot."

Petitioner contended in the Trial Court that this distinctly standardized the safety appliances required on all

cars, but the Trail Court at the instance of the defendant below held that it was untenable inasmuch as subdivision "F" of the said order of the Interstate Commerce Commission of March 13, 1911, extended the period for complying with the provisions as to handholds and sill steps for five years or to a date beyond that on which the accident occurred, with which position the Court of Appeals agreed.

In considering this subdivision it is necessary that subdivisions "F" and "G" be referred to. They are as follows:

> (f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs, *provided,* that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.
>
> (g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight-train cars where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

(Transcript, Fols. 463-464, Defendant's Exhibit No. 9).

A complete answer to the position taken by the lower court we submit is found in subdivision "G."

Subdivision "F" provides that "When a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to standards prescribed in said order in respect to handholds, running boards, ladders, sill steps and brake staffs."

Subdivision "F" is qualified, however, by subdivision "G." It will be observed that the latter provides that "carriers are not required to change the location of handholds (except end handholds under end sills) ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo *regular repairs* they must then be made to comply with the standards prescribed in said order."

It was shown at the trial that this car did undergo *regular repairs* on numerous occasions and notwithstanding that fact, grab irons or handholds and sill steps were not placed on all four corners as required. The evidence shows that the car had been in shop for repairs nineteen times including 1911; twice in May and twice in July, 1912, in September and October, 1913, and July, 1914, which are some of the dates only. It was shown from the General Superintendent of the line owning this car that one pair of wheels was changed on September 17, 1913, (Fols. 500-503), and that the repairs referred to were *regular repairs* as distinguished from rebuilding (Fols. 503-504).

Since therefore this car underwent "regular repairs" as specified in subdivision "G" referred to, it was the duty of the carrier to comply with the provisions of the Interstate Commerce Commission by installing the four sill steps and four side handholds at each of the outside corners of the car, notwithstanding the five year extension authorized

in subdivision "F," and that the failure so to do constituted negligence on the part of the carrier. Both the Trial Court as well as the Court of Appeals held that notwithstanding subdivisions "F" and "G" that the duty of the carrier to install these appliances had not attached because of the five year extension and that therefore there was no negligence on the part of the carrier in its failure so to do.

Had there been a sill step and grab iron at this point where Delahunt and the petitioner attempted to board this car on this night and the same had been removed before they attempted to use it or them, then the carrier would be liable; but the Circuit Court and Trial Court have held in this case that because they were not on at all, the extention order relieved the carrier from putting them on during the five years.

Suppose we assume, for sake of argument, that this car had one grab iron or handhold up by the roof over the door on each side. Would not that be a compliance with the statute as suspended by the decision in this case? Could not this car be used for the five years in that condition without liability?

The answer might be that the orders of the Interstate Commerce Commission required these appliances to be within three inches of the standardized location—but we ask—what appliances? One on each side? Or one within three inches of every place where experience had demonstrated they were required and where the commission had ordered them to be?

We respectfully urge that it was error to hold that paragraph (f) of the order of the Interstate Commerce Com-

mission relieved the carrier of the duty to equip this car with handholds, grab irons and sill steps on all corners.

WHERE AN EMPLOYEE IS INJURED BY REASON OF THE FAILURE TO EQUIP A CAR WITH THE NECESSARY AND REQUIRED SAFETY APPLIANCES LIABILITY FOR THE DAMAGES SUFFERED IS IMPLIED AND THE RIGHT THERETO SEEMS ABSOLUTE.

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in a secure condition."

Texas Ry. Co. v. Rigsby, 241 U. S. 33, citing St. Louis Co. v. Taylor, 210 U. S., 281; C. B. & Q. v. United States, 220 U. S., 559; Delk v. St. Louis Ry. Co., 220 U. S., 580.

> "A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied."
>
> Texas Ry. Co. v. Rigsby, 36 Sup. Ct. Rep. p. 484.

Case cited and approved in

San Antonio & Aranas Pass Ry. Co. v. Wagner, 241 U. S., 476, 36 Sup. Ct. Rep., at page 630.

IF THE INJURY RESULTS FROM A FAILURE TO COMPLY WITH THE SAFETY APPLIANCE ACTS, THEN UNDER THE PROVISIONS OF SUCH ACTS AND OF THE EMPLOYERS' LIABILITY ACTS, "ASSUMPTION OF RISK" AND "CONTRIBUTORY

NEGLIGENCE" ARE ELIMINATED AND DO NOT CONSTITUTE DEFENSE.

Grand Trunk W. R. Co. v. Lindsay, 223 U. S. 42, 34 Sup. Ct. Rep. 581;

Johnson v. Great Northern Ry. Co., (C. C. of A. Eighth Circuit) 178 Fed. 643;

San Antonia Ry. Co. v. Wagner, 241 U. S. 476;

Texas Ry. Co. vs. Rigsby, 241 U. S. 33; Provisions of Statutes quoted *supra*.

POINT III.

THE DEFENDANT WAS GUILTY OF NEGLIGENCE IN NOT INSTRUCTING AND WARNING THE PLAINTIFF THAT IT WOULD REQUIRE HIM TO WORK IN AND ABOUT CARS NOT FITTED AND EQUIPPED WITH THE NECESSARY HANDHOLDS, GRAB IRONS AND STEPS PROVIDED FOR BY THE SAFETY APPLIANCE ACTS.

Cars were almost universally supplied with steps and handholds or grab irons on the sides thereof on all four corners. The plaintiff says every car he had ever handled, ridden or observed in his short experience in this work was so supplied. It appears that other Fruit Growers' Express Cars were so equipped. The accident happened in the night when it was dark. While the plaintiff had a lantern with him, it is a well known fact that the person carrying a lantern in the dark cannot see the details of surroundings as well as one can who is not immediately in the center of the lighted area. That is, when we look out into the dark from the center of a lighted area our vision is obscured and confused: the lantern was for use in signalling and in indicating to others the presence of the man, his position, and the position of a car or train when he is riding it.

Petitioner contends that the carrier owed him the duty of advising or informing him that some of the cars with reference to which he would be required to operate had grab irons or handholds on only two corners, while others had them on all four. Both the Trial Court and the Court of Appeals held however that the respondent owed petitioner no duty in that regard.

The evidence showed that every car, handled, ridden or observed by petitioner in his short experience in this work was supplied with handholds or grab irons on all four outside corners of the car and that other cars belonging to the Fruit Growers Express, of which this was one, were so equipped. The accident happened at night and it was shown that had he raised his lantern used for signaling purposes and then lowered it for the purpose of ascertaining whether these appliances were located at the point at which he attempted to board the car, it would have been equivalent to a signal to the engineer to "go ahead" (Fols. 561, 562). It was shown that these men board and drop off these cars more by instinct and practice than actual observation. It is because of this fact that the law requires this equipment at uniform and fixed places, and in subdivision "G" of the orders promulgated by the Commission direct that if they are located at a greater distance than three inches of the required location, they must be made to comply with the standards. As stated by this court in the case of *Illinois C. R. Co. vs. Williams*, 242 U. S., 462, 466:

> "That they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their

injury or death when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service."

"It is for such emergencies that these safety appliances are provided—for service in those instant decisions upon which the safety of life or limb of a man so often depends in this perilous employment—and therefore this law requires that ultimately the location of these ladders and handholds shall be absolutely fixed, so that the employee will know certainly that night or day he will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come."

The opinion of the Circuit Court of Appeals upon this point discloses a difference of opinion on the part of the judges in this regard. The judge writing the opinion in reference to "green men" of which the petitioner was one, having had only about two months' experience, expresses doubt whether the court should assume that they would necessarily observe such relatively exceptional equipment as existed in the case at bar. He adds "it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits,

that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense."

As we have seen the only modification of this duty to equip was an allowance of time to change to the standard when the equipment was within three inches of the standardized location.

In this case the car was not equipped with any handhold, grab iron or step on the side of this car at the end where plaintiff was expected and required by his duty to board it, and so when he instinctively reached and stepped to board this car, he was, by reason of such absence of equipment, "betrayed" to his injury.

He had never come in contact with a car of that kind before (Fols. 252-253).

Inspectors were provided in these yards by the carrier and petitioner was under no duty to examine cars for these appliances. (Keating, Fols. 481 to 484). His duties required him to signal the engineer to stop after passing the switch points; get off and cross over track, throw the switch; get back and signal the engineer; as the car came toward him get "in a conspicuous position on the front of the leading car." (Record, Fols. 312, 313, Rule 102). Watch for the end of train to which car was to be coupled; signal engineer when car had approached end of train, get off, run forward, see coupler all right and then make the coupling.

We respectfully submit that with all these duties to perform the plaintiff was not in a position to make much inspection for grab irons or sill steps.

The plaintiff had a right to rely upon the assumption that the defendant would not require him to work on or about any car not properly equipped under the Safety Appliance Act and when the defendant required him to do so, it was an additional hazard which it should at least have warned him against.

> "It is a general rule, as respects any hazardous occupation, that the master shall inform his servants of all perils to which they will be exposed, which are or should reasonably be known to him, except such as are obvious to the servant, or through the exercise of ordinary care on their part may be foreseen, and in either event, injury therefrom reasonably avoided."
>
> M'Calman v. Illinois Central Ry. Co., 215 Fed. 465, 469.
>
> "This duty of the master so to inform his servants extends to any change made by him which introduces into their service a new element of danger."
>
> M'Calman v. Illinois Central, *supra.*
>
> "And the duty so imposed upon the master is of a primary character and is therefore nondelegable.
>
> M'Calman v. Illinois Central, *supra.*

We respectfully urge that it was error to refuse to submit this question to the jury and to hold as a matter of law that the carrier was not negligent or that the petitioner was guilty of contributory negligence.

CONCLUSION.

For the reasons hereinbefore stated we respectfully submit that the judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment and decision of the District Court of the United States for the Western District of New York should be reversed and the case re-

manded with instructions to grant the petitioner a new trial and for such other relief as may seem just and within the jurisdiction and practice of this court.

Respectfully submitted,

THOMAS A. SULLIVAN,
EDWIN C. BRANDENBURG,
Attorneys and Counsel for the Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 191.

MICHAEL U. BOEHMER, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Short Statement by Respondent.

Action is under the Federal Employers' Liability Law of 1908, and defendant's answer concedes that at the time and place of the occurrence both plaintiff and defendant were engaged in interstate commerce.

The supposed negligence, upon which plaintiff rests his claim of right to recover, is that on the 8th day of November, 1915, plaintiff was required "to assist in the movement of a car * * * not properly equipped with handholds and steps attached to or near the corners thereof, in accordance with the usual custom and statutes and governmental rules in such case made and provided;" also that defendant had failed to instruct plaintiff that he would be required "to work upon, around, and about cars * * * which were not equipped with footholds, handholds, and steps, at or near all corners thereof" (R., 3).

Defendant denied all negligence on its part, alleged that plaintiff well knew the duties of his position as freight brakeman and the dangers attendant thereon, and that by continuing in defendant's service plaintiff had assumed the risks incident to such employment, such as an accident of the kind here counted upon (R., 6).

On the trial plaintiff testified that he was thirty-two (32) years of age; for fifteen years had been earning his own living at various occupations and was reasonably familiar with the dangers surrounding workingmen (R., 43); had been employed in defendant's signal department for about a year, rated as a carpenter (R., 21), when in September, 1915, he became a brakeman, and after making his "student trips," that is, "one complete round trip

over the entire system—over the main line, and over what we call the creek," he worked as brakeman (R., 20-21) for about two months, until the accident, which occurred November 8, 1915 (R., 3).

The circumstances attending the accident are succinctly, sufficiently, and satisfactorily summed up in the statement of facts made by the learned Circuit Court of Appeals as follows (R., 169):

> "* * * in the night of November 8, 1915 (plaintiff), was employed in switching freight cars at Brocton, N. Y. A refrigerator car, not the property of the defendant, stood upon the nickel plate tracks and was to be transferred into a freight train being made up by one of the defendant's engines and crew to which the plaintiff was detailed. It became necessary to take this car out of the train where it stood and drill it into the proposed train. At some stage of this manœuvre the car was shunted along the track and the plaintiff tried to board it so as to get to the top and put on the brakes. He chose one corner of the car at which there was no grabiron and no sill, putting his hands where he supposed the grabiron would be and his foot where he supposed the sill would be. He fell under the car and his foot was crushed and had to be amputated. It was dark at the time and he carried a lantern. The car in question had a grabiron on each side of the car at one corner, where the pin lever for coupling and uncoupling extends along the end nearly to the corner. It

> had other grabirons on each end of the car at the side opposite to the pin lever and had two ladders, one on each end of the car at the same side as the pin lever" (R., 169-170).

Plaintiff also testified that just previous to the accident he had boarded this car, climbed to its top and set its brake; that he had observed railroad men boarding cars, but had never been instructed to take his lantern and look for handholds on cars (R., 28); after stopping the engine and having set the proper switch he gave the engineer the signal "to back up," using his lamp; "as the car come to me, I put my right foot up and my right hand up, and attempted to board the car; I didn't get hold of anything, and I fell backwards" (R., 33).

Plaintiff while in the service had never observed cars in use "not equipped on all four corners or each side with handholds, ladders, or steps," nor had he been instructed "that cars without handholds and steps on each side, and all four corners, would be used in the trains that" he was to operate (R., 39). After he gave the "back up" signal, the car came towards him "slowly" (R., 57); he did not look to see if there were any grabirons or sill steps (R., 58); he had a copy of the Book of Rules, but was not overly familiar with them (R., 59). Book of Rules was put in evidence by plaintiff (R., 64) and General Rule "O" was read to the jury as follows:

> "Employees must examine, and know for themselves, that the grabirons * * *

> running boards, steps * * * which they are to use * * * are in proper condition * * *" (R., 79, 151).

At the close of the evidence by both parties counsel for defendant moved the court to dismiss the complaint because—

1. Plaintiff had failed to prove the cause of action alleged therein, or any other; had failed to prove and negligence on part of defendant, and had assumed the obvious risks of his employment.

2. Plaintiff had failed to prove any violation of the Safety Appliance Laws (R., 101, 154).

Counsel for defendant also moved the court to direct a verdict for defendant "for no cause of action" on all the above grounds (R., 154).

The latter motion was granted (R., 155) and the jury having returned its verdict under and in accord with such instructions (R., 10) and motion for new trial having been denied (R., 12), judgment was rendered against the plaintiff upon the issues joined (R., 11).

On writ of error to the Circuit Court of Appeals, Second Circuit, the errors assigned were mainly, if not entirely, based upon the alleged failure on part of defendant to see to it that the car in question was equipped "in accordance with the standard un-

der the Safety Appliance Act and the Rules of the Commission" (R., 160, 161).

The Circuit Court of Appeals commenting upon this feature said:

> "The only statutory requirement applicable to this car at the time in question was that of Sec. 4 of the act of March 2, 1893, which provides as follows: 'Until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.'
>
> "* * * It appears to us that the language of the section was complied with. It is clear that the number of grabirons was not specified and it is only by the act of April 14, 1910, as amended by that of March 4, 1911, that the number of grabirons could be prescribed by the Interstate Commerce Commission. Since that time the Interstate Commerce Commission has provided that there shall be grabirons on both ends of each side of the car, with sills under them and ladders on each side of each end of the car. THIS, HOWEVER, IS A NEW PROVISION, AND NOT IN EFFECT ON NOVEMBER 8, 1915 (the date of accident). * * * So it seems to us that the only grabirons on the side of the car contemplated by the act of 1893 were the two actually in place on the car in question" (R., 170).

Answering the proposition that defendant owed plaintiff a duty to inform him that some of the cars about which plaintiff would work had sill steps and grabirons on two corners only, while other cars had them on all four corners, the Circuit Court of Appeals said:

> "The proportion between those cars equipped on all four corners and those equipped on two does not appear. We have only the statement of the engineer that he saw several such cars every day, which we accept as equivalent to saying that any man in the service of the company would encounter them daily several times. Therefore as to men whom custom had familiarized with the existing conditions, it can hardly be said that instructions would have added anything to the facts patently and repeatedly before them. If that very custom betrayed them in a given instance, it was for lack of an equipment which should respond to the inevitable inattention that long custom breeds, and such equipment happily now exists. Instructions would not help in such a situation, and we cannot charge the defendant with what would have been an idle thing.
>
> "As to green men, the case is different; I have some doubt whether we should assume that they would necessarily observe such relatively exceptional equipment. While it was a most unexpected thing to happen, it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in

fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits, that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense."

ARGUMENT.

The accident happened November 8, 1915.

The car immediately concerned was Tropical Refrigerator Express Car 32203, originally numbered 31915, the numbers having been changed October 23, 1915, before date of accident (R., 114, 115).

The car was equipped with standard sill steps and grabirons on the two outside diagonal corners, which bore appropriate relation to the handle of the pin lever for use in coupling and uncoupling cars. It also was equipped with other grabirons, but no sill steps, on each end of the car at the side opposite to the pin lever, and was also equipped

with a ladder at each end of the car on the same side as the pin lever (R., 169, Defendant's Exhibits, photographs numbered 5, 14, 15, 16, 17, and 18, R., 148, 149).

There is no complaint or suggestion that any of this equipment was of improper dimension, or improperly placed or in any manner insecure. Plaintiff's complaint is not leveled against the character or quality of the equipment with which the car was appareled but only insists that there was not enough of it in that (Petitioner's Point 1, his brief, page 20):

> "The Safety Appliance Acts require secure handholds, grabirons and sill steps *at all four corners on the outside.*"

and (Point II, Brief, p. 29):

> "The orders of the Interstate Commerce Commission of March 13, 1911, require (s) handholds, grabirons and sill steps *at all four outside corners of a car.*"

If petitioner is correct in either of these propositions as stated and same are applicable in the circumstances of this case, it is conceded that the concurring judgments of the trial and Circuit Court of Appeals for the Second Circuit were clearly erroneous and should be reversed, but if plaintiff be not correct in either or if correct same are not here applicable, and the use of the car as so equipped was not prohibited by any provision of the Safety

Appliance Acts, or of any order of the Interstate Commerce Commission made pursuant thereto, and the use of such car or cars so equipped was not otherwise forbidden and was not unusual in the movement of freights, then we submit that the concurring judgments of the two lower courts are not clearly erroneous, notwithstanding there may be possible differences in the individual judicial view as to the character and extent of the instructions which an employer might give to adult employees of normal mental development, respecting the presence of dangers cognizable by and obvious alike to the inexperienced and the wise. If neither law nor well-established custom prevailing at the date of the injury complained of (November 8, 1915) required the presence of a grabiron and corresponding sill step at the outside point or corner of the car, where without first looking to ascertain their presence or absence, plaintiff assumed they would be found, then it is submitted defendant was without negligence in the premises, and the concurring judgments of the two lower courts, under the so-called "two-court rule," should be affirmed.

Petitioner brings discussion within narrow limits when he declares (Brief, p. 4) that the case presents but three propositions of law, "each of which is of vital importance to a proper interpretation of Safety Appliance Acts."

We suggest that his first and second propositions present but different phases of the same question, and may well and fairly be paraphrased as fol-

lows: *i. e.*, Did the Safety Appliance acts and orders of the Interstate Commerce Commission in force on November 8, 1915, prohibit the use in interstate commerce of a freight car or cars not equipped with handholds (or) grabirons and sill steps on each of (all four of) its four outside corners?

The pertinent texts for consideration in this connection are as follows:

Section 4 of the act approved March 2, 1893 (27 Stats., 531).

Sections 2 and 3 of the act approved April 14, 1910 (36 Stats., 298).

Two orders of the Interstate Commerce Commission, promulgated March 13, 1911, and simultaneously effective, copies of which will be found in the transcript of record before this court, at pages 173-179, inclusive.

Section 4 of the act of 1893 reads:

> "That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for *greater security to men in coupling and uncoupling cars.*" (Italics supplied.)

Sections 2 and 3 of the act of 1910 read:

> Sec. 2. "That on and after July first, nineteen hundred and eleven, it shall be un-

lawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the tops of such ladders; *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act *and section four of the act of March second, eighteen hundred and ninety-three*, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause

> shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act; *Provided,* That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. * * *" (Italics supplied.)

Under his point I (Brief, p. 20) petitioner contends that under the terms of section 4 of the act of 1893 above "it was the duty of the carrier to provide handholds or grabirons on each of the four outside corners of the car, and the failure of the carrier so to provide constituted negligence" (Brief, p. 21). He concedes, as perforce he must, that "It is true that it (the statute, 1893) does not specify the number as one at each of the four outside corners of the car," but adds, "it is obvious that this number was intended."

The two lower courts concurred in thinking otherwise; the wording of the provision is at least as clear and specific as the provisions in acts regulatory of interstate commerce usually are, and no reported opinion construing the requirement otherwise than as set forth in the opinion of the learned Circuit Court of Appeals (R., 170-171) has been or can be cited.

In *Texas Pacific R. Co. vs. Rigsby,* 241 U. S.,

33, 37, the plaintiff's injuries resulted from the use of a *defective,* not *secure,* grabiron or handhold, furnished by the defendant company, and there was no claim that the car about which he was working fell within specified exceptions.

In *St. Joseph, etc., Co. vs. Moore,* 243 U. S., 311, 315, the tender of the engine was totally lacking in the equipment specifically called for by the act of 1893, viz., "grabirons or handholds in the ends and sides of each car," extended to locomotives and tenders by the act of 1903.

In *Illinois Central R. R. vs. Williams,* 242 U. S., 462, the injury resulted from the giving way of the handhold or grabiron upon which Williams relied to descend from the roof safely. Obviously the handhold was not "secure" and just as obviously the use of a car so equipped was forbidden and made unlawful by a section of the act of 1910.

In the case at bar the equipment supplied answered to the full all requirements of section 2 of the act of 1910.

Under the acts of 1893, 1896, and 1903, the location, manner of application, number, sufficiency and dimensions of the various appliances provided for the use of the men was left to the judgment of the many railroad managers, who, as reasonably to be expected, differed with respect to much of detail. Section 2 of the act of 1910 compelled all such sill steps, handholds, grabirons, ladders, etc., appliances as were then in use or thereafter supplied, to be "secure," but the desirability of stand-

ardizing the number, dimensions, location and manner of application of all such equipment was plain and the necessity of some such provisions as are contained in section 3 of the act of 1910 seems obvious. Pursuant to those provisions the Interstate Commerce Commission functioned by issuing its two orders of March 13, 1911, in one of which the requirement to furnish four side handholds of prescribed dimensions located horizontally and "one near each end on each side of car" first appeared, and in the other the period of time within which common carriers were required to fulfill such requirement was fixed at "five years from July 1, 1911, that is to say, effective July 1, 1916, and not before, except, perhaps, under certain conditions as shopping for repairs "amounting to practically rebuilding," the existence of any such condition not being seriously urged here (R., 173, 175, 177).

As the injuries complained of were received November 8, 1915, it is plain that the requirement of section 3 of the act of 1910, as interpreted by the Commission's orders, is not indicative of any then present duty or obligation on part either of the defendant company which did not own, but nevertheless under then existing applicable law, was bound to accept and transport in interstate commerce the car in question, or on part of the owner of the car itself.

It is respectfully submitted that the record presents no question as to matter of fact which

should have been left to the jury; that the direction of the verdict, no cause of action proved, was proper, and that in matter of law no error—certainly no obvious error—tinctures the concurring judgments of the two lower courts.

In such circumstances this court "is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw inferences therefrom which may possibly conflict with the conclusions below."

Chicago Junction R. Co. vs. King, 222 U. S., 222.

Southern Railroad Co. vs. Puckett, 244 U. S., 571.

Seaboard Air Line R. Co. vs. Kenney, 240 U. S., 489.

Baughman vs. New York, etc., Co., 241 U. S., 237.

Missouri P. R. Co. vs. Omaha, 235 U. S., 121.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

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BOEHMER *v.* PENNSYLVANIA RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 191. Argued March 10, 11, 1920.—Decided April 19, 1920.

Section 4 of the Safety Appliance Act of 1893, in requiring grab irons or handholds "in the ends and sides of each car," should be interpreted and applied in view of practical railroad operations, and does

not mean that the handholds on the sides shall be supplied at all four corners, but is satisfied if they are placed at corners diagonally opposite. P. 498.

Whether a railroad company was negligent in not notifying a brakeman that a car was not supplied with handholds on its sides at all four corners, *held* a matter dependent on appreciation of peculiar facts concerning which this court will accept the concurrent judgment of the two courts below without entering upon a minute analysis of evidence. *Id.*

252 Fed. Rep. 553, affirmed.

THE case is stated in the opinion.

Mr. Edwin C. Brandenburg and *Mr. Thomas A. Sullivan* for petitioner.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon the Federal Employers' Liability Act, petitioner sought damages for personal injuries sustained by him November 8, 1915, while employed by respondent as brakesman. He claimed that the railroad was negligent in using a freight car not equipped with handholds or grab irons on all *four* outside corners; and also in failing to instruct him that he would be required to work about cars not so equipped. The car in question had secure and adequate handholds on the diagonally opposite corners. Being of opinion that this equipment sufficed to meet the commands of the statute and that, under the circumstances disclosed, failure to instruct the petitioner concerning possible use of such car did not constitute negligence, the trial court directed verdict for respondent.

The Circuit Court of Appeals affirmed the consequent judgment. 252 Fed. Rep. 553.

Section 4 of the Safety Appliance Act of 1893 (27 Stat. 531), provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the Act of 1893 was designed for the safety of employees and specified grab irons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we cannot say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad operations; and having considered these the courts below ruled against petitioner's theory.

Likewise we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222.

The judgment is

Affirmed.